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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 73

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF MISSISSIPPI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 1507–1563) is reported at 229 F. Supp. 925.

JURISDICTION

The judgment of the district court dismissing the complaint was entered on March 5, 1964, and a notice of appeal filed on April 10, 1964. Probable jurisdiction was noted on June 22, 1964. The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2, of the Constitution, the Fifteenth Amendment, Sections 1971 and 1974 of Title 42 of the United States Code, Section 101((a)

101(a) of the Civil Rights Act of 1964 (P.L. 88–352), Sections 241–A and 244 of the Mississippi Constitution, Section 3209.6 of the Mississippi Code and Chapters 570, 571, 572 and 573 of the Mississippi Laws of 1962 are reproduced in Appendix A, *infra*, pp. 99–115.

QUESTIONS PRESENTED

1. Whether the United States is authorized to bring suit to declare invalid and enjoin the enforcement of State laws and constitutional provisions relating to the right to vote on the ground that they are in violation of the Constitution and laws of the United States.

2. Whether the following are proper parties to the proceedings: the State of Mississippi; the members of the State Board of Election Commissioners; the named county voting registrars.

3. Whether the complaint states a cause of action with respect to Sections 244 and 241–A of the Mississippi Constitution, so much of Section 3209.6, Mississippi Code, as permits the destruction of voting records, and Chapters 570, 571, 572 and 573 of the Mississippi Laws of 1962 (formerly House Bills 900, 903, 822 and 904), which are alleged to be invalid as in violation of the Fifteenth Amendment to the United States Constitution and the Civil Rights Acts of 1957, 1960, and 1964.

STATEMENT

On August 28, 1962, pursuant to 42 U.S.C. 1971 and 28 U.S.C. 1345, the United States instituted this suit by filing a complaint in the United States District

Court for the Southern District of Mississippi. The defendants—appellees here—were the State of Mississippi, the three members of its Board of Election Commissioners, and six county registrars (R. 1–2).

A. THE COMPLAINT

As amended on March 12, 1963 (R. 66–68), the complaint alleged that in Mississippi, approximately 500,000, or 67 percent, of the white persons of voting age and approximately 20,000 to 25,000, or 5 percent, of the Negroes of voting age, are registered to vote (R. 6), and that, in the six counties involved in this case, voting age population and registration statistics are as follows (R. 2):

	White		Negro	
	Voting age population	Registration	Voting age population	Registration
Amite	4,449	3,295	2,560	1
Coahoma	8,708	8,376	14,604	1,371
Claiborne	1,688	1,440	3,969	138
Lowndes	16,460	5,869	8,362	63
LeFlore	10,274	9,803	13,567	288
Pike	12,163	9,989	6,936	124

The complaint alleges that, since 1890, the State of Mississippi, by law, practice, custom, and usage, has maintained and promoted white political supremacy and a racially segregated society by excluding Negroes from the ballot (R. 3), and that this has been accomplished by the discriminatory use of voter qualification laws, by exclusion of Negroes from Democratic primary elections, and by the periodic tightening of registration requirements as the percentage of literate Negroes increased (R. 3–6).

Specifically, the first claim of the complaint attacks the validity of Section 244 of the Mississippi Constitution, originally adopted in 1890 and amended in 1955, and applied in one form or another by registrars throughout Mississippi for three-quarters of a century.

As amended Section 244 requires that, as a prerequisite for registration, an applicant must read, write, and give a "reasonable interpretation" of any section of the Mississippi Constitution, and demonstrate a "reasonable understanding of the duties and obligations of citizenship under a constitutional form of government" to the local county registrar on a form provided by the State Board of Election Commissioners.[1] The complaint challenges Section 244 and its implementing legislation on the following grounds:

1. Section 244 vests unlimited discretion in the registrar and, in light of its history and the setting of white political supremacy and racial segregation in which it was adopted and enforced, it is an unconstitutional device to disfranchise Negroes;

2. Section 244 imposes new and more stringent requirements for registration following a long period of racial discrimination in the registration process, and exempts from the new requirements most of the white citizens, the inevitable effect of which is to perpetuate past discrimination;

3. In a State where public educational facilities are and have been racially segregated and those for Negroes are inferior, the interpretation test—which

[1] A sample of one of the application forms in use at the time of the hearing below is attached as Appendix B, *infra*, pp. 116–120.

bears a direct relation to the quality of public education—violates the Fifteenth Amendment;

4. Section 244 is vague and provides no objective standards for its administration;

5. There is no reasonable or legitimate interest on the part of the State in requiring as a prerequisite for voting that citizens interpret certain of the legal and hypertechnical provisions of the Mississippi Constitution (R. 4–8).

The second claim attacks Section 241–A of the Mississippi Constitution, enacted in 1960, which provides that applicants for registration shall be of a good moral character. The complaint alleges that this constitutional provision and its implementing legislation are invalid because, since registration is permanent, most of the white citizens in Mississippi are exempt from their requirements. It is also alleged that the challenged provisions afford no objective criteria by which the county registrar may determine whether an applicant has good moral character and thus are so vague and indefinite as to permit registrars to reject Negro applicants arbitrarily (R. 9–13). The complaint asserts that the purpose and effect of this requirement are to provide a device by which registrars may discriminate against Negro citizens who seek to register to vote (R. 11).

The third claim attacks the validity of a Mississippi statute, also enacted in 1960 (now part of Section 3209.6, Mississippi Code, as amended), which permits registrars to destroy registration records. It is alleged that this statute conflicts with the requirements of Title III of the Civil Rights Act of 1960 (R. 15);

that its purpose and effect are to frustrate federal protection of the right to vote without distinction of race, and to facilitate discrimination by county registrars against Negroes seeking to register to vote, and that records actually have been destroyed by at least one of the defendant registrars (R. 14).

The fourth claim attacks a package of legislation adopted by the Mississippi legislature shortly after the United States Court of Appeals for the Fifth Circuit issued an injunction on April 10, 1962, forbidding one of Mississippi's voting registrars (Theron C. Lynd, registrar of Forrest County, Mississippi), from engaging in racially discriminatory practices in registration for voting. This legislative package included House Bills 900, 903, 822, and 904, which were enacted as Chapters 570–573 of the Mississippi Laws of 1962.

H.B. 900—now embodied in Mississippi Code § 3213—requires that applicants for registration fill out all blanks in an application form "properly and responsively" and without assistance. H.B. 903—now embodied in Mississippi Code § 3212.5—prevents registrars from advising a rejected applicant for registration of the reason for his rejection, on the ground that this would constitute assistance to the applicant. H.B. 822 and 904—now embodied in Mississippi Code § 3212.7 and 3217-01 through 3217-15—provide for publication of the names of applicants for registration, require an applicant to wait an extended period before he can determine whether he is registered or has been denied registration, and permit any qualified elector to challenge the qualifications of any applicant whose name is published.

The complaint alleges that House Bills 900 and 903 facilitate deprivation of the right-to-vote on account of race by establishing as grounds for disqualification any formal, technical or inconsequential error or omission by the applicant on the application form; that they vest unlimited discretion in the registrars to determine, without reference to any objective standard, whether an application form is filled out "properly and responsively"; and that the requirements which these statutes establish, including the prohibition against informing applicants of the reason for their disqualification, are arbitrary and unreasonable (R. 19–20). With respect to House Bills 822 and 904, the allegation is that they provide no objective standards for the operation of the challenge procedure, vest the registrars of voters with unlimited power to forestall the registration of qualified Negro citizens by taking the matter under advisement, are arbitrary and unreasonable, and were enacted with the purpose, and have the effect, of giving the white community of Mississippi the opportunity to harass and intimidate Negro applicants for registration whose names are publicized by operation of the statutes (R. 20–21).

All four of the statutes are further challenged on the ground that they exempt from their provisions most of the white citizens—who are presently registered to vote—and that their inevitable effect is to impose more burdensome and stringent requirements for registration on persons not registered prior to 1962. The complaint further asserts that the history of racial discrimination in Mississippi, the legislative setting

in which the statutes were enacted, the lack of objective standards, and the arbitrary character of the requirements, render them violative of 42 U.S.C. 1971 and the Fourteenth and Fifteenth Amendments (R. 21).

The complaint requested relief of various types. There was, first, a prayer for a declaration that Sections 244 and 241-A of the Mississippi Constitution, the legislation implementing both provisions, and the four 1962 statutes attacked, are violative of 42 U.S.C. 1971, Article I of the Constitution of the United States and the Fourteenth and Fifteenth Amendments; and that the statute permitting the destruction of records is in conflict with Title III of the Civil Rights Act of 1960, and, accordingly, void under the supremacy clause of the Constitution (R. 22). Second, the court was asked to find that the use of the invalid legislation has deprived Negro citizens of the right to vote on account of their race pursuant to a "pattern and practice" of racial discrimination.[2] Third, an injunction was sought restraining the defendants from "[e]nforcing and giving any further effect" to any of the challenged provisions; engaging in any act which would deprive any citizen in the State of Mississippi of the right to register and to vote without distinction of race or color, or which would delay, prevent, hinder, discourage or harass Negro citizens, on account of their race or color, from applying for registration and becoming registered

[2] This finding is sought in order to set in motion 42 U.S.C. 1971(e), added by the Civil Rights Act of 1960.

voters in Mississippi; using the application form as a test for Negro citizens, or using any interpretation or understanding test which bears a direct relationship to the quality of public education afforded Negro applicants. Fourth, the complaint specifically requested the district court to order the defendants to register as a voter any Negro applicant who (a) is a citizen not less than 21 years of age; (b) has been a resident of the State, county and election district for the period prescribed by Mississippi law; (c) is able to read; and (d) has not been convicted of any disqualifying crime (according to the Constitution and laws of Mississippi) and is not insane (R. 22–23).

In accordance with a request in the complaint (R. 21–22), a three-judge court was convened (R. 25).[3]

The defendants filed motions to dismiss on the ground that the complaint failed to state a claim upon which relief could be granted (R. 57, 61–62) and for lack of jurisdiction of the subject matter (R. 41). The State of Mississippi filed separate motions to dismiss for lack of jurisdiction (R. 43, 59–60), and for lack of capacity to sue (R. 44). The defendant registrars of voters who are nonresidents of the Southern District of Mississippi moved for change of venue (R. 45, 48, 51, 53). Each defendant registrar also moved for a severance and a separate trial (R. 40, 46, 47, 48, 49, 51, 52, 53, 55).

[3] The three judges originally designated were Circuit Judges Wisdom and Brown and District Judge Cox. Judge Wisdom subsequently asked to be relieved, and Judge Cameron was designated in his place (R. 1276).

Subsequently, on May 17, June 7, June 21, and July 9, 1963, appellees filed extensive written interrogatories pursuant to Rule 33, F.R.Civ.P. (R. 333, 353, 365, 373). Appellant filed voluminous answers on September 3, and supplements thereto on October 30, 1963 (R. 388, 1286). Among the answers to appellees' interrogatories which constitute a portion of the record on this appeal are: census and registration statistics by race in Mississippi from 1890 to 1962 (R. 388–527); historical materials which reflect the legislative purpose and setting of the challenged constitutional provisions and statutes, and the decline in Negro registration since their adoption (R. 528–624); materials detailing the various techniques by which white political supremacy has been perpetuated in Mississippi, including the use of the constitutional and statutory provisions under attack (R. 710–1275, 1286–1408); and a detailed study of the gross disparities in Mississippi's systems of public education for whites and Negroes (R. 625–709).

B. THE ANSWERS TO THE INTERROGATORIES

The answers to the interrogatories assert, or rely upon the following:[4]

1. SECTION 244, MISSISSIPPI CONSTITUTION OF 1890; SECTION 244 AS AMENDED; AND IMPLEMENTING LEGISLATION

(a) *Background and purpose of Section 244*

Between 1870 and 1892 more Negroes than white persons were eligible to vote in Mississippi because

[4] We discuss elsewhere herein (*infra*, pp. 72–73) the technical relevance of these answers to this appeal.

they constituted a majority of the population, and the suffrage provisions of the Constitution of 1869 enfranchised all adult male citizens who registered, met the residency requirements, and were not disqualified by reason of insanity, idiocy, or conviction of certain crimes.

White political domination during these years rested precariously on *ad hoc* tactics. In the words of a delegate to the Constitutional Convention of 1890:

> Sir, it is no secret that there has not been a full vote and a fair count in Mississippi since 1875—that we have been preserving the ascendancy of the white people by revolutionary methods. In plain words, we have been stuffing ballot boxes, committing perjury and here and there in the State carrying the elections by fraud and violence until the whole machinery for elections was about to rot down.[5]

Meanwhile,

> Several ineffectual efforts were made between 1876 and 1890 to have a Constitutional Convention called; these efforts failed because a majority of the white people seemed firmly convinced that a convention would be powerless to so far disfranchise the Negroes as to give the white people a majority of the electors of the state * * *.[6]

A principal purpose of the coming Convention was expressed on October 24, 1889, by United States Senator George to a gathering of his fellow Mississippians:

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[5] Circuit Judge J. B. Chrisman, Lincoln County (R. 534–557).

[6] Judge R. H. Thompson, Lincoln and Jefferson Counties (R. 534–535, 561).

Our First Duty, Therefore,

> When we meet in convention, is to devise such measures, consistent with the Constitution of the United States, as will enable us to maintain a home government, under the control of the white people of the state.[7]

The Mississippi legislature called for the Convention by statute on February 5, 1890.[8] Seventeen days later, the man subsequently elected President of the Convention wrote:

> If [the Negro] brings his own reason to bear on his condition he must see that his future is better assured without the ballot.[9]

On July 29, 1890, the State of Mississippi, whose population was almost 58% Negro, elected 134 delegates: 133 white men and 1 Negro.[10]

The Convention opened on August 18 (R. 529–530), and from that day the records of its deliberations are replete with candid avowals of its purpose:

> Whereas the manifest intention of this convention to secure to the State of Mississippi "white supremacy" * * *.[11]
>
> * * * * * *
>
> I will agree that this is a government of the people, by the people, and for the people; but what people? When this declaration was made by our forefathers it was for the Anglo Saxon people. That is what we are here for today

[7] J. Z. George, delegate-at-large (R. 534).
[8] R. 529.
[9] Judge S. S. Calhoon, Hinds County (R. 535, 557).
[10] R. 535.
[11] R. 540.

to secure the supremacy of the white race.[12]

* * * * *

We are embarked in the same ship of white supremacy, and it is freighted with all our hopes.[13]

* * * * *

We want them [the Negroes] here, but their own good and our own demands that we shall devise some means by which they shall be practically excluded from government control.[14]

The Convention resolved that the Fifteenth Amendment should be repealed so that "such restrictions and limitations may be put upon Negro suffrage, by the several States, as may be necessary and proper for the maintenance of good and stable governments" (R. 538). Unable to change the United States Constitution, the Convention adopted Section 244 of the Mississippi Constitution of 1890, which, as amended, is challenged in the first claim of the complaint. In its original form, it required that an applicant for registration read any section of the State Constitution, *or* understand it when read to him, *or* give a reasonable interpretation of it.

Some of the delegates viewed the measure as penalizing supposed Negro characteristics:

The fifteenth amendment to the Federal Constitution was not violated by our State Constitution in the enactment of which we only circumvented by Anglo-Saxon ingenuity. There is not a word in the constitution of 1890

[12] J. H. McGehee, Franklin County (R. 540, 559).
[13] Thomas P. Bell, Kemper County (R. 541, 557).
[14] Judge S. S. Calhoon, Hinds County (R. 542, 557).

> which discriminated against the colored people; race characteristics alone can be said to have been causes of disfranchisement.[15]

Others expected discriminatory manipulation of the test to disfranchise Negroes:

> * * * I fear sir, it will lead to trickery and fraud.
>
> * * * * *
>
> Adopt this qualification and it places in the hands of the officer who is to apply the test the power to defraud and disfranchise.[16]

The expectation was particularized by a member of the Convention. On September 11, 1890, the Jackson, Mississippi *Clarion-Ledger* reported that Judge Chrisman from Lincoln County stated (R. 544):

> It looks as if it was intended that if a register [sic] wanted the man to vote he would read him some such clause as Slavery except as a punishment for crime should be forever prohibited. "Do you understand this?" "Oh yes." But if he did not want him to vote he would read him the interstate clause or the section forbidding the Legislature to pass *ex post facto* laws and demand a construction.

In a retrospective evaluation of this requirement, among others, a member of the Convention's Franchise Committee wrote in 1902:

> These several suffrage requirements combined were deemed sufficient for the end in view, as they have so proved in even the blackest parts of the State. They have, as

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[15] Judge R. H. Thompson, Lincoln and Jefferson Counties (R. 548).

[16] R. 543.

> they were intended, reduced the negro majorities to a negligible political quantity.[17]

In 1890, more than 55% of the eligible voters were Negro (R. 531). By 1899, when Negroes constituted 57% of the adult population, their number of registrants had fallen below 10% of the electorate (R. 389). By 1903 a leading newspaper could say:

> The probable total registration of the state today including those who had registered for the August primary is in the neighborhood of 100,000 of which none exceeding 20,000 are colored. Despite the oft-expressed fear that the Negro is trying to get back into politics no information of this kind is shown on the registration book, a very small number qualifying for citizenship who are really entitled to do so. County registrars have kept the Negroes off the books by strict enforcement of the understanding clause in the Constitution.[18]

Similarly, although illiteracy among Negroes declined substantially from 1899 to 1952, and although the number of Negroes has never fallen below 40% of the State's adult population, registration among eligible Negroes has declined to its present level of about 1 in 20. Registration among white adults, on the other hand, has remained at 60 to 75%.[19]

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[17] R. 553.

[18] *Clarion-Ledger*, Jackson, July 16, 1903 (R. 596).

[19] R. 4, 6.

(b) Unconstitutional use of Section 244

United States Senator Bilbo summed up the role of Section 244 in 1946:

> The poll tax won't keep 'em from voting. What keeps 'em from voting is section 244 of the constitution of 1890, that Senator George wrote. It says that a man to register must be able to read and explain the Constitution when read to him * * *. And then Senator George wrote a constitution that damn few white men and no niggers at all can explain * * *.[20]

Just as Section 244's discriminatory purpose is seen in its history, its racial effect is clear from its use by county registrars, two of whom told a Special Committee of the United States Senate in 1946:

> The CHAIRMAN. What other restrictions did you place on the colored applying to register, in contrast to the whites, other than the requirement as to the production of the poll-tax receipt?
>
> Mr. FIELD. The only other thing I did was to ask them to read the section of the constitution of the State of Mississippi where it explains the election of the Governor of the State of Mississippi. I did not require that of the whites, but I did require it of the colored.
>
> The CHAIRMAN. Why did you make the exception?
>
> Mr. FIELD. I didn't require it, that is, I have no other reason than that they were colored.[21]
>
> * * * * *
>
> Mr. WYMAN (Counsel for the Committee). Did you ask any of these individuals (Negroes)

[20] R. 596.

[21] R. 589.

whether they could read, prior to the time you questioned them?

Mr. COCKE. I did.

Mr. WYMAN. And did they satisfy the requirements of being able to read?

Mr. COCKE. They said that they could.

Mr. WYMAN. But after that you questioned them?

Mr. COCKE. I did.

Mr. WYMAN. Do you remember, Mr. Cocke, ever having made a statement that no matter how they answered these questions, that they were disqualified?

Mr. COCKE. I think I told them in short words that they would have a hard time convincing me, I believe I made that statement.[22]

During the first half of this century, then, white political supremacy was brought about and maintained in Mississippi by intentionally discriminatory registration standards and procedures, the white primary, outright refusals to process Negro applicants, intimidation at the polling place and in the registrar's office, and refusals to accept poll tax payments.[23]

(c) Background of amended Section 244 and implementing legislation

This Court sounded the death knell of the white primary in 1944.[24] And in June of 1951, the United States Court of Appeals for the Fifth Circuit questioned the practice of requiring literate applicants

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[22] R. 590.

[23] Disfranchisement of Negroes to 1955 by the use of Section 244 and other discriminatory devices is detailed at R. 563–592. And see the dissenting opinion below at R. 1565, 1591–1603.

[24] *Smith* v. *Allwright*, 321 U.S. 649.

also to interpret a section of the Constitution (apparently in plain violation of the Mississippi law) and enjoined any discrimination as between white and Negro applicants in this respect.[25]

Since the vast majority of Mississippi's Negroes were literate in 1952, the legislature proposed at once that Section 244 be amended to require that applicants be literate *and* able to interpret any section of the Constitution. The proposed constitutional amendment required an affirmative vote by the electorate and it did not carry in the November 1952 general election.[26]

When the legislature met next, in 1954, it adopted another resolution to amend Section 244.[27] In addition to the requirements that an applicant be literate and able to interpret a section of the Constitution, this proposal required that he be able to demonstrate to the registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government and that he execute a sworn written application for registration on a form to be prescribed by the State Board of Election Commissioners. This resolution, dated April 24, 1954, exempted from the new requirements all persons registered before January 1, 1954, *i.e.*, about one-twentieth of the eligible Negroes and roughly two-thirds of the adult white population.

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[25] *Peay* v. *Cox*, 190 F. 2d 123 (C.A. 5), certiorari denied, 342 U.S. 896.

[26] R. 597.

[27] Mississippi Laws, 1954, ch. 427 (R. 597–598).

As election day neared, the amendment was explained to Mississippi's voters and they were exhorted to adopt it:

> The amendment is intended solely to limit Negro registration.[28]

As a Mississippi newspaper explained on election day:

> And the second [the proposed amendment to Section 244] tightened up voting requirements and discouraged if not prevented further qualification of negroes for voting.[29]

The amendment was adopted on November 2, 1954. Post-election newspaper comment was as follows:

> Slowly mounting returns today gave a 19 to 1 lead to a proposed amendment to restrict negro voting in Mississippi.[30]
>
> * * * * *
>
> With 347 precincts reporting the vote was 17,317 for the amendment to change the laws for qualification of voters to provide for reading and interpreting the state constitution as a requirement for the new registrants the amendment [sic] is plainly aimed at negro voters and the provisions would not apply to those already qualified.[31]

In January, 1955, an extraordinary session of the legislature inserted the amendment in the Constitution, adopted implementing legislation and authorized

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[28] Robert Patterson, Chairman of the Association of Citizens' Councils of Mississippi (R. 602).

[29] *Clarion-Ledger*, Jackson, November 2, 1954 (R. 603).

[30] *Meridian Star*, Meridian, November 3, 1954 (R. 604).

[31] *Clarion-Ledger*, Jackson, November 3, 1954 (R. 604).

the State Board of Election Commissioners to prepare application forms.

(*d*) *Discriminatory use of amended Section 244 and implementing legislation*

The answers show a consistent pattern of discrimination in the selecting of test sections to be interpreted. In Leake County, for example, between January 2, 1960 and September 5, 1961, there were forty-six white applicants for registration and eleven Negro applicants. Thirty-six of the whites, but only one Negro received the one-line section 240. None of the whites, but ten of the eleven Negroes received the lengthy section 241 (R. 1007). Similarly, in Copiah County, from the period February 15, 1960, to January 3, 1963, the short section 30 ("There shall be no imprisonment for debt") was assigned to 388 of the 528 white applicants, but to none of the thirteen Negro applicants (R. 965–966). In Rankin County from January 1957 to August 1963, 97% of the 4,199 white applicants received one of the following three sections:

> *Section 207.* Separate schools shall be maintained for children of the white and colored races.
>
> *Section 101.* The seat of government of the state shall be at the city of Jackson and shall not be removed or relocated without the assent of a majority of the electors of the state.
>
> *Section 11.* The right of the people peaceably to assemble and petition the government on any subject shall not be impaired.

Only 16% of the Negro applicants received one of

the above sections, while 84% of the Negro applicants were given sections of far greater length and complexity, including sections concerning the removal of judges for reasonable cause on grounds insufficient for impeachment (§ 53), the appropriation of educational funds and the support of sectarian schools (§ 208), the fictitious issue or increase of stock of transportation carriers (§ 196), the exercise of the right of eminent domain (§ 190), and treason against the State (§ 10). No white applicant received any of these sections (R. 1369–1370). Comparable examples in other counties of discrimination in the choice of sections for interpretation are found elsewhere in the Record (R. 775–776; 821–823; 884; 932–933; 1053; 1055; 1231–1233; 1264–1266; 1301).

The answers to the interrogatories show that Mississippi registrars have not only discriminated racially in the selection of sections for interpretation, but also in the grading of the interpretations. For instance, a Negro in Hinds County, given Section 20 to interpret, was told by the deputy registrar that he "missed it by one word" (R. 991). In Madison County a Negro was advised that her interpretation was "too far-fetched" (R. 1024). In Jefferson Davis County, the registrar told one Negro that his interpretation "wasn't quite right" (R. 1159). Another Negro in that County was told that her interpretation was "not full enough" (R. 1164). Similarly, a Negro in Madison County was informed that she had not written enough on the interpretation, that the registrar "wanted an essay" (R. 1023). On the other hand, a Negro in Pike County, having inter-

preted a constitutional section, was rejected because she "had not condensed it enough" (R. 1359).

The registrars have not been so fastidious in the grading of interpretations submitted by white applicants. In George County, white applicant John Cecil McMillan, asked to interpret section 30, providing "There shall be no imprisonment for debt," gave the following interpretation (R. 1272): "I thank that a Neorger should have 2 years in collage before voting because he don't understand." He was registered (R. 1272). White applicant Ernestine Williams, who also was registered, gave this interpretation of section 30:

> There shall be no imprisonment for death is what section 30 means to me (R. 1274).

Again, in Jefferson Davis County, white applicant Jeffie Garner Smith—registered on July 7, 1956—was asked to interpret section 30. His interpretation was:

> Without due process of time and law (R. 1202).[32]

Similarly, in explaining the duties and obligations of citizenship under a constitutional form of government, a white accepted applicant in Tallahatchie County wrote

> Yes I fully understand the duties and obligations of citizenship under a constitutional form of government (R. 1330).

Yet, between March 24, 1955, and June 1962, more than 300 applications filed in 15 counties by Negroes—many with college training and some with

[32] Many other examples are cited in the answers to interrogatories. See R. 780–781; 800–803; 939–945; 985; 1223; 1272–1274; 1308–1310; 1316–1320.

graduate degrees—were rejected because, in the judgment of the registrar, the applicant had failed to give a reasonable interpretation of the constitutional section assigned to him, or demonstrate a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government, or both.[33]

(e) *Disparity of educational systems for Negroes and whites*

Public education for Negroes in Mississippi has at no time approached that afforded white persons. As Mississippi's Governor White conceded in a message to the Mississippi legislature in 1953, "there is a wide variation in educational opportunities between the races" (R. 649). Other state officials also have recognized the disparity (R. 647–648), as have the biennial reports transmitted to the Mississippi legislature by the State Superintendent of Public Education (R. 649–657) and studies authorized by the Mississippi legislature, the State Superintendent of Public Schools, and other public educational authorities in Mississippi (R. 657–697).

Thus, official reports of public officials and public agencies in Mississippi reflect that, in a public school system which rigidly has segregated teachers as well as pupils, white teachers are more highly

[33] In many counties, there is massive evidence of assistance given to whites, but not to Negroes on the interpretation and citizenship tests (R. 796–800; 813–814; 824–848; 864–866; 887–906; 919–920; 935–938; 967–986; 1007–1019; 1038–1043; 1055–1074; 1078–1085; 1137–1138; 1142–1150; 1199–1201; 1203–1222; 1234–1252; 1301–1307; 1314–1316; 1323–1336; 1344–1348; 1353–1358; 1362–1364; 1372–1374; 1376–1388; 1390; 1393–1407)—in other words, that the tests were "tests" for Negroes but not for whites.

trained [34] and better paid [35] than Negro teachers. The State spends more money for the instruction of white children.[36] Although in 1910 Mississippi decided that consolidation of small rural schools would provide better education for children (R. 639), real consolidation of Negro schools did not begin until after this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483—40 years after consolidation of white schools (R. 640). The plight of rural Negro schools was described in a 1933–1935 report issued by the State Superintendent of Public Schools (R. 652):

> In hundreds of rural [Negro] schools there are just four blank, unpainted walls, a few old rickety benches, an old stove propped up on

[34] For example, in 1961–1962, there were 2,473 white teachers with graduate degrees in the public school system (out of a total of 11,058), but only 553 Negro teachers with graduate degrees (out of a total of 7,382) (R. 628).

[35] In 1941–1942 the average yearly salary of white teachers more than tripled that of Negro teachers. In 1961–1962, white teachers, on the average, still received over $500 more per year than Negro teachers (R. 629).

[36] In 1929–1930, the State spent almost six times as much per white child as per Negro child. Even in 1960–1961, the state spent $173.42 per white child, but only $117.10 per Negro child (R. 631). See, also, R. 635–638. In 1931, teachers in Negro schools frequently had in their charge from seventy-five to one hundred and fifty pupils (R. 651). In his report for 1943–1945, the State Superintendent stated that nearly half of the 3,345 Negro public schools were schools in which "the equipment is nil" (R. 654). During the 1961–1962 school year, 150 school districts throughout the state spent an average of $80 per capita above the state minimum for the education of their white children, but an average of $19.50 per capita above the same state minimum for Negroes—a difference of more than 75% (R. 632–634).

> brickbats, and two or three boards nailed together and painted black for a blackboard. In many cases, this constitutes the sum total of the furniture and teaching equipment.

Although the number of Negroes of school age always has exceeded the number of whites (R. 627), at all times more white high schools have been accredited than Negro high schools, both by the State of Mississippi [37] and by regional accrediting associations.[38] The deficiencies in Negro elementary schools are reflected in a similar relative lack of accreditation.[39]

The higher education provided to Negroes by Mississippi also has been substantially inferior to that afforded whites. For example, a much wider variety of courses are offered to white than to Negro college students in Mississippi (R. 645). A survey report authorized by Mississippi authorities in 1954 declared that (R. 658):

> The State provides, through the University of Mississippi and other state colleges, ample opportunities for white students to pursue graduate and professional study; but the Negro student has been compelled to go outside the State for this service.

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[37] In 1959–60, there were 404 white, but only 176 Negro, high schools accredited by the State of Mississippi (R. 642).

[38] In 1959–60, there were 96 white, but only 7 Negro, high schools accredited by regional accrediting associations (R. 642).

[39] In 1960–61, 96.9% of the white, but only 44.3% of the Negro, elementary schools were accredited by the State of Mississippi. Similarly, while 26.7% of the white elementary schools were regionally accredited, only 10.3% of the Negro elementary schools had received regional accreditation (R. 643).

Similarly, a 1961 report of another study authorized by the State of Mississippi stated (R. 660):

> * * * With the exception of the work towards a Master's degree for principals and supervisors at Jackson State College, no graduate work is at present available to Negro students within the State (R. 660).

2. SECTION 241–A MISSISSIPPI CONSTITUTION; IMPLEMENTING LEGISLATION

Prior to 1960, Section 241 of the Mississippi Constitution, as implemented by Sections 3214 and 3235 of the Mississippi Code (1942), provided that persons convicted of certain felonies could not become or remain registered, or vote.

During the 1960 legislative session, bills were introduced to require that electors be of good moral character.[40] On May 5, the legislature approved a constitutional amendment to that effect which, after adoption by the voters on November 8, 1960, became Section 241–A of the Mississippi Constitution.[41]

Legislation implementing this amendment—detailed *infra*, pp. 29–30—also was enacted during May, 1962.

3. RECORDS DESTRUCTION STATUTE

Prior to 1960, Mississippi law provided that application forms and other registration paraphernalia should "* * * remain a permanent public record" (amended Section 3209.6, Mississippi Code (1942))

[40] A study of the Legislature's preoccupation with racial legislation appears at R. 607–611.

[41] R. 610.

and "* * * be carefully preserved by the county registrar" (amended Section 3209.7).

During the late winter and spring of 1960, the United States Congress debated the legislation that was to be approved on May 6 as the Civil Rights Act of 1960. Title III of that Act requires local officials to keep and make available to the Attorney General records relating to the eligibility of persons for voting in federal elections.[42]

The Mississippi legislature condemned the "vicious so-called Civil Rights Bills" by joint resolution on March 3, 1960.[43] Three weeks later, a bill specifically authorizing the destruction of registration records was introduced, and, on March 28, three constitutional amendments designed to eliminate written applications for registration were presented.[44] On April 13, W. F. Minor wrote in the New Orleans *Times-Picayune*:

> * * * the Mississippi Senate moved Tuesday to permit voter registrars to destroy records of rejected Negro voter applications.
>
> * * * *
>
> Explanation of the purpose of the bill was made while the Senate was still in an executive session called to confirm several gubernatorial appointments.
>
> But one senator said later, "If this bill is going to have any effect, it must be passed before the President signs the Civil Rights Bill."[45]

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[42] 42 U.S.C. (Supp. V) 1974–1974b.
[43] R. 14, 608.
[44] R. 608, 609.
[45] R. 612–613.

Senate Bill No. 1883, approved April 15, 1960, added provisions permitting the destruction of records to Sections 3209.6 and 3209.7 of the Code. Pursuant to it, records required to be preserved by Title III of the Federal Act have been destroyed by one of the defendant registrars (R. 14–15).

4. THE "PERFECT FORM" REQUIREMENT

(a) *Background and legislative purpose*

Section 3213, Mississippi Code (1942), as amended in 1955, has been the principal statutory implementation of Section 244 of the Mississippi Constitution. From 1955 to 1962, it required applicants for registration to read and write any section of the constitution and interpret it reasonably to the registrar, to demonstrate a reasonable understanding of the duties and obligations of citizenship, and to fill out an application form unaided.

As noted above, the complaint asserts that the form embodying these requirements, prepared by the defendant State Election Commissioners and used by the defendant registrars, has been the vehicle of gross racial discrimination. It is alleged that white applicants throughout Mississippi have been registered without forms or with error-ridden forms and that many have received unlimited help with the forms. Negro applicants, however, have uniformly worked unaided and have been rejected for trivial errors and omissions which do not bear on their substantive qualifications as voters.[46]

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[46] See generally R. 710–1275, 1286–1408.

Litigation by the United States against these practices in various counties first bore fruit on April 10, 1962, when a temporary injunction was granted by the Court of Appeals for the Fifth Circuit in a widely publicized case against the registrar of Forrest County.[47] The court found that, while white applicants were being registered without forms, with woefully defective forms, and with help on forms, well qualified Negroes were being rejected because of picayune errors on comparatively better forms, which they had filled out unaided. Moreover, they were not advised of the reasons for their rejections and arbitrarily were required to wait for six months before reapplying.

The court ordered the registrar to cease discriminating and specifically: (1) to assist Negro applicants in the same measure as whites; (2) to ignore insignificant errors and omissions on Negroes' forms and permit applicants to correct such trivia when called to their attention; and (3) to abandon the unauthorized six-month waiting period between applications.

The Legislature reacted promptly. On April 17, 1962, bills were introduced providing: (1) implementation of the good moral character criterion already announced in Section 241–A of the Constitution; (2) a strengthening of the existing requirement that applicants execute a letter-perfect form wholly without assistance; (3) a requirement that the names of applicants for registration be published and an invitation to voters to challenge the qualifications of appli-

[47] *United States* v. *Lynd*, 301 F. 2d 818 (C.A. 5), certiorari denied, 371 U.S. 893.

cants; (4) a direction to the registrars not to advise rejected applicants of the reasons for their rejection (except as to those rejected on account of bad moral character), as that would constitute illegal help; and (5) an express requirement (not enacted) that rejected applicants wait six months before trying again.[48]

The perfect form and good moral character requirements became parts of amended Section 3213 via House Bill 900, approved on May 23, 1962. Section 3212.5 (House Bill 903, also approved on May 23, 1962) was added to the Code to direct registrars to mark rejected forms so as to conceal from reapplying applicants the reasons for the initial rejections:[49]

(*b*) *Discriminatory use of "perfect form" requirement.*

The application form, augmented by the requirement of perfect execution, has been widely used to thwart Negroes' attempts to register. In 8 counties, 173 Negroes were rejected explicitly because of the "perfect form" requirement. In one county, 5 Negroes were rejected for failing to place their names at a certain line of the form; 94% of the accepted white persons in that county had been guilty of the same omission. In another county, about 1500 white persons registered without filling out forms or even going to the registrar's office, and in 3 others 341

[48] R. 620–622.

[49] The sworn written applications for registration prepared by the defendant members of the State Board of Election Commissioners pursuant to the new requirements (Section 3209.6, as amended by House Bill 905, approved May 26, 1962) contain designated spaces for moral character data and simple "Passed" and "Failed" spaces. See *infra*, p. 120.

white persons' applications were executed, wholly or in part, by someone other than the applicant. Registrars and registrants have testified to assistance furnished to white applicants in cases tried to date in 9 counties. Indeed, 76 patterns of substantially identical answers appear on white persons' forms in 27 counties. In 4 counties in which law suits have been filed under 42 U.S.C. 1971(c), it was proved that more than 50 white persons who are functionally illiterate have been registered since the form was instituted.[30] In all of these counties, Negroes were required to satisfy all of the requirements of State law as a prerequisite to registration.

5. THE "PUBLICATION" PROVISIONS

Section 3212.7 of the Mississippi Code requires that, within 10 days after application to register is made and before consideration is given to the sufficiency of the application, the name and address of the applicant must be published in a local newspaper. The information must appear once a week for two weeks, under a heading "Applicants for registration to vote." Ostensibly, the purpose of this statute is to give any qualified voter of the county the opportunity to challenge "the good moral character * * * and any other requirement of any applicant to vote." Sections 3217-01-3217-15 of the Code fix the period during which such challenges may be made and the procedures—including an elaborate hearing procedure—to be followed upon a challenge. If no challenge is made during the prescribed four-week period, the registrar

[30] These uses of the new requirements are detailed at R. 771-1075 by county.

is directed to determine within a reasonable time whether the applicant is qualified to vote.

The practical effect of requiring publication of the names of applicants is dramatically illustrated by the recital in the answers to appellees' interrogatories of incident upon incident of intimidation of Negroes in connection with their attempts to exercise the right to vote. The following are representative examples:

a. Negro residents of Yazoo County were deterred from voting on twenty-six different occasions by threats or fears of economic reprisal[51] (R. 947–954).

b. At least three serious incidents of intimidation have occurred in Amite County[52] (R. 954–956).

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[51] For example, one Negro was threatened by a white man at the polls, and then visited the following night by five white men who suggested that he remove his name from the voting lists. Another white man removed his leased gas tank from the Negro's property (R. 948). Another Negro was fired from his job when he registered and was reemployed when he removed his name from the rolls (R. 947). In nine other cases Negroes were told they would lose credit or other financial aid, or could not get their cotton ginned, if they remained registered. Six others heard of these incidents and had their names removed. Three removed their names because they feared they would lose their jobs.

[52] On one occasion, two Negroes were walking to the courthouse to vote, accompanied by voter registration worker Robert Moses. They were stopped on the street and Moses was badly beaten. The other two decided not to register (R. 955). On another occasion, when Moses accompanied three Negroes to the registrar's office he was arrested and fined for impeding an officer in the course of his duties (R. 954–955). A third incident in Amite County occurred when a voter worker who accompanied three applicants to the courthouse was beaten up before a crowd of white men on the lawn behind the courthouse. The Negroes filling out forms heard the beating and could see the crowd through the window. They left without completing their forms (R. 956).

c. A Negro woman in George County who attempted to register was told by the registrar that Negroes who worked for white persons and who belong to the NAACP would lose their jobs if they tried to vote (R. 1262).

d. In Issaquena County, Negroes who sought to pay their poll taxes were told by the sheriff that their attempt to do so would result in cancellation of plans for building and repairing roads in their neighborhood (R. 926).

e. In Leflore County, Negroes who attempted to register to vote were visited by white men shortly after the attempt and told not to return to the registrar's office (R. 816).

f. A Negro in Montgomery County, who had a daughter teaching in the school system, was informed by the principal that his effort to pay his poll tax might affect his daughter's job status (R. 875).

g. An effigy in woman's clothes was burned before the home of a woman applicant in Tallahatchie County after her name and address had appeared in the paper in connection with her application to vote (R. 811).

C. THE DECISION BELOW

On March 6, 1964, the district court (Circuit Judge Brown dissenting) dismissed the complaint in its entirety for failure to state a claim upon which relief could be granted. In granting the motion of the State of Mississippi to dismiss (R. 1532), the majority found "substantial" the State's contention that Congress may not constitutionally implement the Fourteenth or Fifteenth Amendments by legislation directed "to the sovereign entity of the state

itself" (R. 1518), but actually rested its ruling on a construction of the statute authorizing joinder of the State (section 601(b) of the Civil Rights Act of 1960, 42 U.S.C. (Supp. V) 1971(c)) which, the court held, does not permit suit against the State where there are functioning registrars (R. 1532).

The court next granted the motion of members of the State Board of Election Commissioners to dismiss, holding that they are neither indispensable, necessary nor proper parties, because "they are not charged with enforcing or threatening to enforce any of the statutes under attack" (R. 1533; 1534).[53] As to the six county registrars named as defendants, the court held that in the absence of a charge of joint wrongdoing, it could "find no authority to continue the suit against them as a joint cause of action" (R. 1535).[54]

As an independent ground for dismissal as to all defendants, the court held further that the United States lacked standing to maintain this action because

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[53] The court suggested that this was true of the State as well (R. 1530).

[54] The court further stated (1) that if the United States intended by its complaint to state a cause of action based on a pattern and practice of individual racial discrimination by the registrars, "such causes of action would be justiciable solely before a single district judge" (R. 1536); (2) that venue lay only over the claims asserted against two of the defendant registrars, *i.e.*, those who resided in the Jackson Division of the Southern District of Mississippi, and (3) that the acts of the several registrars could not "be pooled in determining whether there has been a pattern or practice under the terms of the statute" (R. 1536).

42 U.S.C. 1971, in its view, does not authorize the government to bring an action attacking State constitutional provisions or laws.[55] To construe Section 1971 to authorize "a direct attack" by the United States on the voter qualification laws of an "Indestructible State" would be "a doubtful constitutional construction," said the court, for the field of voter qualification is "committed exclusively to * * * [the States] by the Constitution * * *" (R. 1540).

Proceeding to consider, "[a]t the risk of tedium," the challenged constitutional and statutory provisions, the court sustained each of them (R. 1544). It first declared, as "basic principles", that (1) legislative history or background cannot be considered when the words of a statute are plain and unambiguous, and, accordingly, the constitutional status of the provisions attacked "cannot be changed by delving into supposed legislative intent, history or purpose", and (2) "the method of application or administration of the statutes cannot affect the validity or invalidity of the statutes themselves" (R. 1546).

Taking up each provision in turn, the court adopted, with respect to Section 244, Sections I and II of an earlier opinion in *Darby* v. *Daniel*, 168 F. Supp. 170 (S.D. Miss.), which had rejected an attack on Section 244 in a class action by a Mississippi Negro. Reliance also was placed upon this Court's decision in *Lassiter* v. *Northampton Election Board*, 360 U.S. 45, upholding a North Carolina literacy test (R. 1547-1548), and a decision of the Court of Appeals for the

[55] The court also suggested that it lacked statutory jurisdiction (R. 1536).

Fifth Circuit in *Trudeau* v. *Barnes,* 65 F. 2d 563 (C.A. 5), certiorari denied, 290 U.S. 659, upholding the Louisiana "interpretation test" (R. 1548). Distinguishing the recent contrary decision of the three-judge district court in *United States* v. *State of Louisiana,* 225 F. Supp. 353 (E.D. La.), appeal pending, No. 67, this Term, the majority emphasized Mississippi's written application form and what it characterized as the "simple" and "cheap" administrative procedure for reviewing decisions of the registrar via appeal to the County Election Commission (R. 1549–1551).

In defense of Section 241–A of the Mississippi Constitution, the court noted that good moral character is a prerequisite to naturalization, to admission to practice before the bar of this Court and other federal courts, and, in Mississippi and elsewhere, to obtaining a license for the practice of various professions ranging from operation of a barbershop to the practice of medicine, as well as a qualification for voting in Alabama, Georgia, Louisiana, and Connecticut (R. 1553–1554). "Good moral character" seemed to the majority below a "self-defining", "concise and meaningful description of an attribute of a desirable citizen", "calculated to improve the quality of the electorate * * *" (R. 1554–1555).

The court turned next to Section 3209.6 of Mississippi Code (the records destruction statute) and held that, since the provision is permissive only, it is not in conflict with Title III of the Civil Rights Act of 1960 (42 U.S.C. 1974). The court likewise disagreed with the government's contention that Sections 3213 (the "perfect form" requirement) and 3212.5 (impos-

ing upon the applicant the responsibility to return to the registrar's office to determine whether he has passed or failed and prohibiting registrars from advising rejected applicants of the reason for their rejection) facilitate racial discrimination by establishing formal, technical or inconsequential errors or omissions on the application form as grounds for disqualification (R. 1557), and constitute an arbitrary restriction on the franchise (R. 1558). The court said that "If it is an exacting examination, which we do not determine it to be, it is one which the statute requires to be administered without regard to race, creed or color," and that it was "beyond the jurisdiction of this court to question" (R. 1559). The court thought the requirement that each blank in the form and oath be filled out "properly and responsively" establishes "a definite enough standard for intelligent and consistent application", and added that, even if it does "operate to 'trip' applicants into a disqualifying omission", the form operates indiscriminately without regard to race (R. 1559).

The court upheld on similar grounds the statutes requiring publication of the names of applicants, and authorizing qualified voters to challenge the qualifications of persons whose names are so published. The majority thought it a full answer to the claim that these provisions invite white citizens to harass Negroes that they also "vest power and authority in Negro citizens to harass whites, in Negro citizens to harass Negroes, and in white citizens to harrass whites," and that "[t]he choice as to whether to exercise the power * * * is one of purely private decision

not subject to the mandates of the Fourteenth or Fifteenth Amendments" (R. 1560).

Finally, the court found unjustified the request that appellees be required to register Negro applicants who satisfy the age and residence requirements, can read, have not been convicted of a disqualifying crime, and are not insane (R. 1563).

Judge Cox, in a separate concurring opinion (R. 1611), expressed his "unconditional" agreement with the views of the majority opinion, in which he joined.

In the view of Circuit Judge Brown, in dissent (R. 1566):

> The decisive question is, therefore, whether the United States may maintain this suit and whether it may be maintained against the State of Mississippi. Once that is decided, nearly everything falls into place, or becomes a matter of superficial consequence. [Footnote omitted.]

Judge Brown found authority to sue under both 42 U.S.C. 1971(c) and (d) and the broad prerogative of the national sovereign (R. 1567–1571). He regarded as anomalous the doctrine that wholesale disfranchisement is immune from redress while "little wrongs" are not (R. 1568). The dissent further held that the State is amenable to suit (1) because of the express language of subsection (c) and (2) because the actions challenged are, in fact, those of the State. Judge Brown concluded that the complaint amply states a claim, and that the answers to appellees' interrogatories demonstrated "that the Government has at least an arguable basis for establishing its claim on a trial" (R. 1582).

SUMMARY OF ARGUMENT

I

The majority below erred in holding that the United States is not authorized to bring an action which challenges the validity of State constitutional and statutory provisions alleged to disfranchise Negroes on account of their race.

A. Section 1971(a) explicitly secures, to all citizens otherwise qualified by law, the right to vote without distinction of race or color, "any constitution, law, custom, usage, or regulation of any State * * * to the contrary notwithstanding." The "law" under which the citizen must be "otherwise qualified" does not include a provision invalidated by the Fifteen Amendment. The legislative history of Section 1971(a) shows that it is a statutory recital of the rights guaranteed by the Fifteenth Amendment. Like the Fifteenth Amendment, it reaches all acts which deny or abridge the right to vote on account of race, whether they are done pursuant to unconstitutional laws or constitute illegal practices adopted by State officials in administering valid voting laws.

B. Section 1971(c)—added by the Civil Rights Act of 1957—authorizes a suit by the United States to enjoin every "act" engaged in by any "person" which abridges a "right or privilege" secured by Section 1971(a). It makes no distinction between an act *proscribed* by, and an act *dictated* by, State law. And since State officials are "persons," when they apply laws which disfranchise Negroes on account of their race, they "engage in [a prohibited] act or prac-

tice." The legislative history of Section 1971(c) reflects a congressional intent to reach any kind of activity aimed at disfranchising citizens on account of their race, including conduct directly commanded by State laws.

II

The majority below also erred in holding that the State of Mississippi is not a proper party.

A. Section 601(b) of the Civil Rights Act of 1960 (now incorporated in 42 U.S.C. 1971(c)) confirms the right of the United States to sue the State. It does not confine that authority to the case in which registrars are unavailable as defendants, but expressly permits *joinder* of the State. This reading is confirmed by the legislative history and the uniform rulings of all courts (other than the court below and one subsequent ruling) which have had occasion to consider the question.

B. There is, in the present context, no constitutional obstacle to joining the State itself as a party defendant. Here, as in the Fifteenth Amendment, "State" is a short-hand for the several agents of the State government. There is thus no conflict with the theory of the cases construing the Fourteenth and Fifteenth Amendments in the light of the bar imposed by the Eleventh. In any event, since the United States is the plaintiff, sovereign immunity concepts are inapplicable.

C. Joinder of the State is wholly appropriate here. Because the suit involves the validity of State laws, and because the relief sought is statewide and must bind all the agencies of the State, it is fitting and

necessary that the State itself be the principal defendant.

III

The majority below also erroneously ruled that the members of the State Board of Election Commissioners were improper parties and that the individual registrars were not properly joined.

A. It is the duty of the Board to prepare application forms "designed to exhibit the essential facts and qualifications necessary to show that [an applicant] is entitled to register and vote," including those here attacked. The complaint appropriately seeks relief enjoining the members of the Board from giving any further effect to the provisions challenged in this suit, and such an injunction properly would require them to omit from the forms questions designed to exhibit the qualifications sought to be nullified by t' court's decree. This would facilitate compliance the registrars with the decree and eliminate any ossibility of conflict between the decree and directives of the Board (which has the power to remove a registrar if he is an "improper person").

B. Joinder of the six registrars as defendants was proper. The two requirements of the joinder rule (Rule 20(a), F. R. Civ. P.) are satisfied here. First, questions of law common to all the registrars will arise in the action because it is claimed that each registrar is administering, in common with the others, a particular set of unconstitutional laws. Second, there is asserted against the defendants a "right to relief * * * in respect of or arising out of the same transaction, occurrence, or series of transactions or

occurrences," whether the "transaction" or "occurrence" is viewed as the legislative transaction or occurrence involved in the enactment of an unconstitutional law, or the implementation by each defendant of the challenged laws. It obviously would be wasteful of the time and energy of the courts and of counsel not to join the six registrars in a single action. Since joinder was permissible, venue was proper as to each of the registrars.

IV

The majority below further erred in dismissing the complaint for failure to state a claim. The allegations, if proved—as the answers to interrogatories forcefully suggested they could be—amply state a cause of action with respect to the several challenged State registration provisions, which, of course, are not insulated from the claim that they abridge Fifteenth Amendment rights.

A. The charge here is that a specific constitutional right—the franchise on which the security of other basic rights depends—has been grossly abridged on grounds of race. Tested by applicable standards, the laws challenged here are unconstitutional. It is alalleged that they are part of a scheme or system of laws calculated to disfranchise the Negro and have achieved that objective. But, even apart from their purpose, most of the provisions here attacked—because of the lack of adequate standards and the uncontrolled discretion they vest in local registrars—offend constitutional limitations; they are potential instruments for discrimination. Moreover, it is al-

leged that the potentiality can be proved and that the statutes may be judged in the light of the gloss which the consistent and generalized discrimination practiced under them have affixed to the text.

Finally, two of the Mississippi statutes plainly conflict with recent congressional enactments, and another of them—by requiring publication of the names of applicants for registration and inviting challenges to their qualifications by other voters—directly inhibits applications by Negroes. In sum, the complaint fully states a cause of action.

B. If the allegations of the complaint are sustained, the government will clearly be entitled to substantial relief. Not only should enforcement of the unconstitutional laws be enjoined throughout the State, but it would be appropriate—and plainly within the judicial power—to enjoin the application of any new and more stringent standards to Negroes so long as there remain voters who have not been required to meet any but the most basic requirements. And it will be proper, if the claim is proved, to enter a finding that discrimination has amounted to a "pattern or practice," thus making available the special relief authorized by the Civil Rights Act of 1960.

ARGUMENT

I

THE UNITED STATES IS AUTHORIZED TO CHALLENGE CONDUCT ENGAGED IN PURSUANT TO RACIALLY DISCRIMANATORY STATE VOTING LAWS

The Attorney General is expressly authorized to institute "in the name of the United States" a proceed-

ing to enjoin "any act or practice which would deprive" any citizen "otherwise qualified by law to vote" of his right to participate in elections "without distinction of race, color, or previous condition of servitude." So much is beyond dispute: these are the relevant terms of Section 1971 of Title 42 of the United States Code as amended by the Civil Rights Act of 1957, sustained as applied to the acts of State officials in *United States* v. *Raines*, 362 U.S. 17.[56] The majority below held, however, that, whereas 42 U.S.C. 1971(c) authorizes the federal government to challenge the action of individual registrars in discriminatorily administering valid laws, the statute does not invest the United States or its Attorney General with power to bring an action to enjoin conduct *pursuant* to the State's constitution or laws (R. 1538).

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[56] Because, in our view, the statutory basis for the present suit is clear, we find it unnecessary to discuss other possible grounds of standing. At least insofar as the challenged registration laws discriminate against Negroes with respect to their right to vote in *federal* elections (see *Ex parte Siebold*, 100 U.S. 371; *Ex parte Yarborough*, 110 U.S. 651; *Logan* v. *United States*, 144 U.S. 263; *Wiley* v. *Sinkler*, 179 U.S. 58; *Swafford* v. *Templeton*, 185 U.S. 487; *United States* v. *Mosley*, 238 U.S. 383; *Burroughs and Cannon* v. *United States*, 290 U.S. 534; *United States* v. *Classic*, 313 U.S. 299; *United States* v. *Saylar*, 322 U.S. 385; *Wesberry* v. *Sanders*, 376 U.S. 1), the United States may have standing, independent of 42 U.S.C. 1971(c), to seek injunctive relief. Cf. *In re Debs*, 158 U.S. 564; *United States* v. *City of Jackson, Mississippi*, 318 F. 2d 1, 320 F. 2d 870 (C.A. 5); *United States* v. *U.S. Klans*, 194 F. Supp. 897 (M.D. Ala.); *United States* v. *City of Montgomery*, 201 F. Supp. 590 (M.D. Ala.); *United States* v. *Louisiana*, 225 F. Supp. 353 (E.D. La), appeal pending, No. 67, this Term.

On its face, this proposition is remarkable. The result would be that the Attorney General could seek injunctive relief against the relatively "little" wrongs involved in the discriminatory "torts" of minor officials, but that federal district judges must turn a deaf ear to his plea that Negroes are being disfranchised under authority of organic and statutory provisions of State law which bring about discrimination on a massive scale. Indeed, if the majority below were correct, suit would not lie to restrain action taken under a State law which explicitly denied Negroes the right to vote. Such a narrow and paradoxical construction of the statute is warranted neither by its language nor by its legislative history. It rests on alternative premises, both equally fallacious.

A. SECTION 1971(a) SECURES THE RIGHT TO VOTE FREE FROM RACIALLY DISCRIMINATORY STATE CONSTITUTIONS AND LAWS.

The holding below is predicated, first, on the proposition that Section 1971(a)—the old statute[57] which defines the "right or privilege" which, since the Civil Rights Act of 1957 (42 U.S.C. 1971(c)), the Attorney General is authorized to enforce—does not secure the right to vote *as against discriminatory State organic or statutory laws.* The suggestion is that, because Section 1971(a) guarantees freedom from racial discrimination only to those "who are

[57] 42 U.S.C. 1971(a) derives from §1 of the Act of May 31, 1870, 16 Stat. 140. It was later incorporated in the Revised Statutes as § 2004. See *United States* v. *Raines*, 362 U.S. 17, 19, note 1.

otherwise qualified by law to vote," the provision does not permit questioning the validity of the voting laws themselves, however discriminatory.

The text of the statute is a full answer. It provides:

> All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, * * * township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; *any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding* [emphasis added].

In context, it is plain that the phrase "otherwise qualified by law" in section 1971(a) does not mean "otherwise qualified under the laws of the State, whether or not those laws themselves work a discrimination on account of race or color." Such a construction wholly ignores the last clause of the provision (emphasized in the quoted text, above)—the obvious intent of which is to remove racially discriminatory qualification laws (organic or statutory) as effective bars to the exercise of the elective franchise. The reading of the court below would render the statute meaningless, for a State could then disfranchise Negroes simply by erecting a statutory barrier to their participation in elections by expressly decreeing that Negroes could not vote, or by enacting strict standards

and exempting therefrom persons previously registered at a time when Negroes were not permitted to vote. See *Lane* v. *Wilson,* 307 U.S. 268; *Guinn* v. *United States,* 238 U.S. 347. Obviously, as Judge Brown noted in his dissent below (R. 1570), the "law" under which the claimant must be "otherwise qualified" does not include racially discriminatory provisions invalidated by the Fifteenth Amendment. Cf. *Neal* v. *Delaware,* 103 U.S. 370, 389.[58]

The fact is that Section 1971(a) is a statutory recital of the rights guaranteed by the Fifteenth Amendment, fully as broad as the constitutional provision which inspired it. Those who were present at its

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[58] A Delaware constitutional provision restricted the right of suffrage at general elections to free white male citizens, and a Delaware statute confined the selection of jurors to persons "qualified to vote at the general election." The question was whether a Negro indicted in a Delaware court could remove his case to a federal court on the ground that Delaware's constitution and laws denied to Negroes the right to serve as jurors. Holding that the discrimination did not result from Delaware's Constitution and laws, this Court said (103 U.S. 370, 389):

"Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualifications of jurors was, itself, enlarged in its operation, so as to embrace all who by the State Constitution, as modified by the Supreme law of the land, were qualified to vote at a general election."

If the phrase "qualified to vote" in a *State* statute means "qualified to vote under *valid* State law," *a fortiori,* it means the same thing in a *federal* statute implementing the Fifteenth Amendment.

enactment in 1870, both proponents [59] and opponents,[60] so viewed it, as did the legislators of 1957 who added to it.[61] The lower federal courts have consistently so understood it, from the beginning [62] to the present.[63] Indeed, this Court has impliedly equated the statute and the Amendment it implements, *Guinn* v. *United States, supra,* 238 U.S. at 355, 361, *Myers* v. *Anderson,* 238, U.S. 368, 379.[64] Thus, it is clear that Sec-

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[59] Representative Davis of New York, who had served on the conference committee, stated: "The first section is substantially a recital of e provisions of the Constitution." 92 Cong. Globe 3882.

[60] Senator Morton of Indiana asserted that "[t]he first section might be left out * * * because it is simply declaratory of the amendment itself." 91 Cong. Globe 3571. Similarly, Senator Thurman of Ohio declared that "[y]ou cannot add any strength to the fifteenth constitutional amendment by putting the very identical provision of that amendment into the shape of a statute." 91 Cong. Globe 3485. And Representative Swaim of Maryland, also an opponent of the bill, said that section 1 was "affirmatory only of the Fifteenth Amendment." 94 Cong. Globe 432. See also the remarks of Representative Kerr of Indiana. 92 Cong. Globe 3872.

[61] The bill which ultimately became the Civil Rights Act of 1957 was H.R. 6127, introduced by Representative Celler, chairman of the House Committee on the Judiciary. Discussing subsection (a) on the floor of the House, he referred to it as "a statutory declaration of the protection of the fifteenth amendment * * *. Cong. Rec. 84th Cong. 2d Sess. 12925.

[62] See, *e.g., Ex Parte McIllree,* 16 Fed. Cas. No. 8,820 (C.C. Va. 1870).

[63] See, *e.g., United States* v. *McElveen,* 177 F. Supp, 355, 358–359 (E.D. La.), later judgment affirmed in part *sub nom. United States* v. *Thomas,* 362 U.S. 58.

[64] Whereas it has recently been said that § 1971(a) has a broader scope than the Fifteenth Amendment, and is therefore unconstitutional in whole or in part, see *United States* v. *Raines,* 172 F. Supp. 552 (M.D. Ga.), reversed, 362 U.S. 17, the reverse has never been suggested. The dearth of judicial opinion

tion 1971(a), like the Fifteenth Amendment itself, nullifies racially discriminatory voting laws as well as the acts of lesser officials. See *Lane* v. *Wilson, supra; Guinn* v. *United States, supra; Myers* v. *Anderson, supra; Ex Parte Yarbrough,* 110 U.S. 651, 665; *Neal* v. *Delaware,* 103 U.S. 370.

B. SECTION 1971(C) AUTHORIZES THE UNITED STATES TO INSTITUTE PROCEEDINGS TO SECURE SECTION 1971(A) RIGHTS, INCLUDING THE RIGHT TO EXEMPTION FROM RACIALLY DISCRIMINATORY STATE VOTING LAWS, CONSTITUTIONAL AND STATUTORY

The second predicate of the decision below—insofar as it dismissed the complaint on the ground that the Attorney General lacked authority to bring the action—appears to be that, whatever the scope of Section 1971(a), Section 1971(c), added by the Civil Rights of 1957, permits only a suit to restrain a "person" who "engage[s]" in "act[s] or practice[s]" violative of the rights secured by the substantive provision, and not a challenge to State laws themselves, even if their enforcement abridges Section 1971(a) rights (R. 1539–1540).

Again, we turn to the text of the provision invoked. So far as here relevant, Section 1971(c) reads:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or prac-

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interpreting Section 1971(a) reflects the fact that—until 1957 when it defined the scope of a suit by the United States—it was viewed as a merely declaratory provision which added nothing to the self-executory first section of the Fifteenth Amendment. See *United States* v. *Reese,* 92 U.S. 214, 216; *Terry* v. *Adams,* 345 U.S. 461, 481, note 9.

> tice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of the section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. * * *

On its face, the statute seems to authorize a suit to enjoin every "act" which abridges a "right or privilege" secured by Section 1971(a). Since the substantive provision referred to, as we have seen, confers, *inter alia,* an exemption from racially discriminatory voting laws, and the present section draws no distinction, it would seem to make no difference whether the "act or practice" complained of (assuming it is "State action," as is conceded here)[46] is *dictated* by the State constitution or statutes, merely *permitted* by local law, or *proscribed* by it. Nothing in the language of Section 1971(c) suggests a contrary result. Plainly, whoever else is meant to be included, State officials are "persons", and, when they apply discriminatory laws, albeit under direct command from the State constitution or statutes, they "engage in [a prohibited] act or practice" to the same degree as when they discriminate on their own initia-

[46] There is no occasion here to consider whether Section 1971(c) attempts to reach too far when it authorizes a suit to restrain racially discriminatory acts of "any person" with respect to non-federal elections. See *United States* v. *Raines*, *supra*, 362 U.S. at 19–20, 24–26. But no such question is presented here, where only the State and certain of its officers, acting in their official capacities, are sought to be restrained.

tive. The only difference is that, in the one case, the State officials are enjoined from enforcing offensive laws, while, in the other, the constitutional and statutory provisions themselves are not affected and the unauthorized conduct of the offending official alone is restrained.

This natural reading of Section 1971(c) is fully confirmed by its legislative history. In describing the proposed legislation, which became Section 1971(c), the Report of the Committee on the Judiciary of the House of Representatives stated: "Therefore, the sovereign, acting within its constitutional jurisdiction, must preserve this fundamental and basic right *against any and all unlawful interference. That the proposal of this section does that very thing is clear.*" House Report No. 291, Committee on the Judiciary, 85th Cong., 1st Sess., p. 13 (emphasis added). And in the hearings before the House Rules Committee, Representative Keating of New York, a member of the Judiciary Committee which reported out the bill, stated: "The Attorney General is given the right to bring civil actions *to prevent any kind of activity aimed at disenfranchising the citizens* * * *" (emphasis added). Hearings before the House Rules Committee on H.R. 627, 84th Cong., 2nd Sess., pp. 64–65.[46]

Opponents of the proposal were clear as to its scope. Thus, Senator Ervin of North Carolina stated before

[46] See, also, the remarks of Congressman Celler of New York (p. 47) and Congressman Smith of Virginia (p. 49). Hearings, *supra*.

the subcommittee on constitutional rights of the Senate Judiciary Committee:

> To my mind these proposed amendments are a most drastic alteration in the law of our country in that first, they allow, as I construe them, the Attorney General in the exercise of his discretion, *to set at nought statutes enacted by States* in the exercise of their powers both under the State and Federal Constitutions; * * *. Hearings before the Subcommittee on Constitutional Rights, Senate Committee on Judiciary, 85th Cong., 1st Sess., p. 191 [emphasis added].

Again, during hearings of the Committee on Rules of the House of Representatives, Senator Ervin testified:

> So the Attorney General under this bill could bring a suit for any alien, any citizen, any private corporation, on any cause of action which alleged that, either *by the wording of the State law* or by the application to him of the State law by State or local officials, he had suffered discrimination; * * * Hearings before Comm. on Rules, House of Rep. on H.R. 6127, 85th Cong., 1st Sess., p. 130 [emphasis added].

Finally, it is instructive that, when adding to the provision in 1960, Congress understood that it had already authorized suits directly challenging discriminatory State statutes. This is made plain by the legislative history of new Section 1971(e), added by the Civil Rights Act of 1960 (Pub. L. 86-449, § 601 (a); now 42 U.S.C. (Supp. V) 1971(e)). As we elaborate later (*infra*, pp. 94-96), the new provision permits special relief in the event the court finds that a violation of Section 1971(a) is "pursuant to a pat-

tern or practice." Explaining that phrase on the day the proposal passed the Senate, Senator Keating, a prominent proponent,[47] explicitly stated (106 Cong. R. 7767) that the "enactment of a statute directed at Negroes could in itself constitute a pattern or practice of discrimination." Since Section 1971(e) is, in terms, applicable only to a suit by the Attorney General under Section 1971(c), it follows, of course, that an act done "pursuant to" a State law is within the reach of the latter provision.

II

THE STATE OF MISSISSIPPI WAS PROPERLY JOINED AS A PARTY DEFENDANT

The apparent predicate of the majority below in sustaining Mississippi's motion to dismiss is that an "Indestructible State" is amenable to suit by the national sovereign only in very rare circumstances, which even the most explicit Congressional authorization cannot unduly expand (see R. 1531). There is no such rule. Whereas the United States enjoys an absolute immunity from unconsented suits by the States, the reverse has never been true. *Kansas* v. *United States*, 204 U.S. 331, 342. Under familiar principles, the United States may freely sue a State. In this respect—to borrow the blunt phrase of Mr. Justice Holmes from a somewhat different context—a proceeding by the United States to enforce the Constitution against State action "is not a controversy

[47] See *Coleman* v. *Kennedy*, 313 F. 2d 867, 868 (C.A. 5), certiorari denied, 373 U.S. 950, where the court characterized Senator Keating as "one of the principal spokesmen for the bill in the Senate."

between equals." *Sanitary District* v. *United States,* 266 U.S. 405, 425. At least since *United States* v. *Texas,* 143 U.S. 621, it has been settled that the States, by joining the Union and submitting to the Constitution, surrendered any claim of "sovereign immunity" as against the national government.

Of course, the United States must have the interest necessary to maintain the action and the State must be an appropriate defendant. As in other cases, the standing of the United States to bring the proceeding may be inherent, as when it sues to recover its own property (*e.g., United States* v. *Oregon,* 295 U.S. 1) or that of its wards (*e.g., United States* v. *Minnesota,* 270 U.S. 181); when the action is on a monetary claim, whether arising out of contract (*e.g., United States* v. *North Carolina,* 136 U.S. 211), tort (*e.g., United States* v. *California,* 328 F. 2d 729 (C.A. 9), certiorari denied, October 12, 1964, No. 87, this Term), or otherwise (*e.g., United States* v. *Michigan,* 190 U.S. 379); and when the government seeks to enjoin State interference with federal rights (*e.g., United States* v. *California,* 332 U.S. 19), federal activities (see *United States* v. *West Virginia,* 295 U.S. 463, 473), federal officers (*e.g., United States* v. *Louisiana,* 188 F. Supp. 916 (E.D. La.), stay denied, 364 U.S. 500, and affirmed *sub nom. Bush* v. *Orleans Parish School Board,* 365 U.S. 569), or the orders of a federal court (*e.g., United States* v. *Mississippi,* No. 19,475, 9/25/62 (C.A. 5), leave granted to United States to be joined as respondent and certiorari denied *sub nom. Mississippi* v. *Meredith,* 372 U.S. 916). In such instances, it is irrelevant that

Congress has withheld express authorization for the suit. *United States* v. *California, supra,* 332 U.S., at 26–28. On the other hand, standing may derive from statute. That is the case when the government sues to collect a tax (*e.g., New York* v. *United States,* 326 U.S. 572), or a penalty (*e.g., United States* v. *California,* 297 U.S. 175). Cf. *United States* v. *Raines,* 362 U.S. 17. But, whatever the basis, the sufficiency of the interest to prosecute the suit does not depend on the character of the defendant. If the United States can sue at all, it can sue a State (if, otherwise, a proper respondent).[68]

Thus, here, the standing of the United States being settled beyond constitutional doubt by Section 1971(c) (*supra,* pp. 49–53), it should follow, without more, that the State can be sued. There is no separate question of authorization to join the State. The only relevant inquiry is whether Congress has changed the usual rule by explicitly barring an action against the State and whether, in the circumstances, the State is

[68] Prior to the revision of the Judicial Code in 1948, there was a *jurisdictional* difference in that, absent a special provision, suits by the United States against a State were within the exclusive original jurisdiction of this Court. See 28 U.S.C. (1940 ed.) 341. Even then, the power of Congress to provide for the trial of such cases in the district court had been affirmed (see *Ames* v. *Kansas,* 111 U.S. 449; *United States* v. *Louisiana,* 123 U.S. 32) and, in specific instances, that power had been exercised. *E.g., United States* v. *California,* 297 U.S. 175; *Case* v. *Bowles,* 327 U.S. 92. Now, however, by virtue of 28 U.S.C. 1251(b)(2) and 1345, the district courts may entertain any suit by the United States against a State without special legislation. Thus, here, there is no question of the district court's jurisdiction. It is, in any event, explicitly confirmed by 42 U.S.C. 1971(d).

an appropriate defendant. Whatever the answer earlier (see *United States* v. *Alabama*, 171 F. Supp. 720 (M.D. Ala.), affirmed, 267 F. 2d 808 (C.A. 5), vacated and remanded, 362 U.S. 602),[69] both questions have been resolved by Section 601(b) of the Civil Rights Act of 1960, which added the second paragraph to Section 1971(c) (42 U.S.C. (Supp. V) 1971(c)).

A. SECTION 601(b) OF THE CIVIL RIGHTS ACT OF 1960 EXPRESSLY CONFIRMS THE AUTHORITY OF THE ATTORNEY GENERAL TO JOIN THE STATE AS A PARTY DEFENDANT

Section 601(b) of the Civil Rights Act of 1960 (74 Stat. 90) added the following paragraph to Section 1971(c):

> *Whenever*, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be *joined* as a party defendant *and*, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his

[69] Even before the 1960 amendment to § 1971(c), the only real argument that joinder of the State was unauthorized was that the original section impliedly restricted the Attorney General to injunctive proceedings against a "person" and that a State is not a person. As we argued in the *Alabama* case, the weakness of that contention is illustrated by such decisions as *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292 U.S. 360; *United States* v. *California*, 297 U.S. 175; *New York* v. *United States*, 326 U.S. 572; and *Sims* v. *United States*, 359 U.S. 108. See Brief for the United States in *United States* v. *State of Alabama*, No. 396, October Term 1959, pp. 24–40. In light of the intervening legislation, this Court did not resolve the question. 362 U.S. at 604.

> office and no successor has assumed such office, the proceeding may be *instituted* against the State. [Emphasis added.]

On its face, the statute is unambiguous. We cannot improve on Judge Brown's explication in his dissenting opinion below (R. 1572):

> * * * First, as a substantive matter, it declares that "any act or practice constituting a deprivation" of subsection (a) rights committed by "any official of a state or subdivision thereof" shall "be deemed that of the state." Second, it provides a procedural remedy to enforce that substantive right. It does this by prescribing two things: (a) the "state may be *joined* as a defendant"; and (b) if there is no person holding the office capable of being sued as a defendant to which the state may be *joined*, then "the proceeding may be *instituted* against the state."

To construe Section 601(b) as precluding suit against the State where there are functioning registrars—as the majority below did—is to ignore the plain words of the statute. Nor does its legislative history support that result.

To be sure, the provision was enacted when the *Alabama* case was pending here (see 362 U.S. 602) and was designed to meet the situation presented there, in which the registrars had resigned and had not yet been replaced. The original version of Section 601(b) did no more than solve the *Alabama* problem. The measure (H.R. 10035) at first provided (106 Cong. Rec. 1575):

> When any official of a state or subdivision thereof has resigned or has been relieved of his

> office and no successor has assumed such office, any act or practice of such official constituting a deprivation of any right or privilege secured by subsection (a) or (b) hereof shall be deemed that of the State and the proceeding may be instituted or continued against the State as party defendant.

But, during the ensuing hearings, additional problems were noticed. See Voting Rights, Hearings before the Committee on the Judiciary, House of Representatives, 86th Cong., 2d Sess., Feb. 9 & 16, 1960. The following inquiry by Chairman Celler of the House Judiciary Committee (*id.*, at 34) shows the focus:

> Let us assume that a State registrar has resigned who was the defendant in the original proceeding.
>
> * * * * *
>
> The proceedings were started against him, and the order was issued against the man who has resigned, or the man who is dead after the order was issued. What happens then?

Chairman Celler's question highlighted the need for a provision that would authorize not only *institution* of the suit against the State if the registrars had already resigned and *substitution* of the State as defendant if the registrars resigned in mid-suit, but, also, *joinder* of the State with the registrars (among other things, to take care of the case in which they resigned or died after the decree was rendered). Accordingly, a revised bill (H.R. 10625) was intro-

duced by Congressman McCullough (the author of the original bill) which—as he said (106 Cong. Rec. 3293)—included the improvements suggested by the hearings. The new measure—permitting joinder of the State in every case where State officials were alleged to be abridging Section 1971(a) rights—was enacted as Section 601(b).

Finally, the question whether Section 601(b) authorizes joinder of the State when there are, at the outset, registrars amenable to suit, is fully settled by the decided cases. Indeed, this Court's affirmance of the *Alabama* decision after remand at least impliedly upholds joinder of the State in such circumstances. *United States* v. *Alabama*, 371 U.S. 37, affirming, 304 F. 2d 583 (C.A. 5). For, there, dismissal of the State was denied even after new registrars had qualified and the decree was rendered against both. See 188 F. Supp. 759, 762; 192 F. Supp. 677 (M.D. Ala.). The lower courts have consistently so ruled.[70] *United States* v. *Lynd*, 301 F. 2d 818 (C.A. 5), certiorari denied, 371 U.S. 893; *United States* v. *Dogan*, 314 F. 2d 767, 771 (C.A. 5); *United States* v. *Lynd*, 321 F. 2d 26, 27 (C.A. 5), certiorari denied, 375 U.S. 968; *United States* v. *Duke*, 332 F. 2d 759, 770 (C.A. 5); *United States* v. *Louisiana*, 225

[70] Besides the instant case, a single member of a three-judge court in a very recent suit filed by the Attorney General since the enactment of the Civil Rights Act of 1964 dismissed the State of Mississippi as a defendant prior to trial. That ruling is subject to review by the court as a whole. *United States* v. *McClellan*, No. C.A. 3607(J)(M), (S.D. Miss.), August 21, 1964.

F. Supp. 353, 356 (E.D. La.), appeal pending, No. 67, this Term."

B. THERE IS NO CONSTITUTIONAL OBSTACLE TO JOINDER OF THE STATE

Without ruling on the question, the majority below characterized as "substantial" Mississippi's claim that Section 601(b) is unconstitutional because the Fifteenth Amendment only authorizes implementing legislation directed "to persons through whom a state may act and not to the sovereign entity of the state itself" (R. 1518). The contention is based on what Judge Brown characterizes as the "Eleventh Amendment dialectic" (R. 1574) which draws a distinction between the State as an idealism, incapable of wrong, and its erring agents, who are viewed as acting individually

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[11] See, also, *United States* v. *Penton*, 212 F. Supp. 193, 200 (M.D. Ala.); *United States* v. *Fox*, 211 F. Supp. 25, 35 (E.D. La.), affirmed, 334 F. 2d 449 (C.A. 5); *United States* v. *Wilder*, 222 F. Supp. 749, 753, 754–755 (W.D. La.); *United States* v. *Ward*, 222 F. Supp. 617, 620 (W.D. La.), appeal pending, No. 21235, C.A. 5; *United States* v. *Manning*, 205 F. Supp. 172, 174 (W.D. La.); *United States* v. *Clement*, 231 F. Supp. 913 (W.D. La.); *United States* v. *Crawford*, 229 F. Supp. 898, 901 (W.D. La.); *United States* v. *Logue*, Civil Action No. 3081–63, (S.D. Ala.), March 31, 1964; *United States* v. *Cartwright*, 230 F. Supp. 873 (M.D. Ala.); *United States* v. *Cox*, No. D–C–53–61, (N.D. Miss.), June 24, 1964.

There are, it is true, decisions holding that, in the circumstances, the State should not be joined in the ultimate decree. See *United States* v. *Atkins*, 323 F. 2d 733, 740, n. 8 (C.A. 5); *United States* v. *Ramsey*, 331 F. 2d 824, 826 (C.A. 5); *United States* v. *Ford*, Civil Action No. 2829, S.D. Ala., decided April 13, 1964. But that is a separate question. No court, before the decision below, has held joinder of the State unauthorized under Section 601(b). Nor was the State ever dismissed prior to trial until this case.

and unofficially when violating the Constitution. See *Ex Parte Young*, 209 U.S. 123, 159. There are two answers.

First, the State is not joined here as an abstraction; in Section 601(b) the term "State" is used precisely in the same sense as in the Fifteenth Amendment. Here, as there, "State" is a convenient collective embracing the several branches and officers of the State government. Under Section 601(b), the State is sued only because the responsible officials are unknown or may withdraw and lose their identities. In effect, the action is directed to all those who participate in the scheme of racial disfranchisement, none of whom, of course, enjoys legal immunity from the Constitution—be they legislators (*e.g., Lucas* v. *Colorado Gen. Assembly*, 377 U.S. 713), the governor (*e.g., Sterling* v. *Constantin*, 287 U.S. 378), judges (*e.g., Ex Parte Virginia*, 100 U.S. 339), or lesser officials. See *Cooper* v. *Aaron*, 358 U.S. 1, 16–19. After all, the State "can act in no other way." *Ex Parte Virginia, supra*, 100 U.S. at 347. And, when the thrust of the suit is merely to enjoin conduct (without touching State property) a decree nominally against the State actually reaches its agents alone. In short, the suit is against the State government. If private plaintiffs were involved, the Eleventh Amendment or considerations of sovereign immunity might render such shorthand impermissible; but, as we have already shown, the United States labors under no comparable disability.

The distinction between the United States and a private plaintiff suggests a second answer—perhaps more direct. The cases invoked by Mississippi below

deal with a question of remedies: by virtue of the Eleventh Amendment and the doctrine of sovereign immunity, the States, as such, are not amenable to private suits, whether asserting rights under the Constitution or otherwise. But it does not follow that the States are not bound to obey the Fifteenth Amendment's command, which "is directed to the United States and to the individual States." *Terry* v. *Adams*, 345 U.S. 461, 473 (opinion of Mr. Justice Frankfurter). On the contrary, as this Court said with respect to the Fourteenth Amendment in *Home Tel. & Tel Co.* v. *Los Angeles*, 227 U.S. 278, 286–287, in language equally applicable to the Fifteenth:

> * * * the provisions of the Amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, *of course, to the States*, but also to every person whether natural or juridical who is the repository of state power. By this construction the reach of the Amendment is shown to be coextensive with any exercise by a State of power, in whatever form exerted. [Emphasis added.][72]

[72] The Court further indicated that "the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, *proceeds not merely upon the assumption that States acting in their governmental capacity in a complete sense may do acts which conflict with its provisions*, but, also conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency. Thus the completeness of the Amendment in this regard is but the complement of its *comprehensive inclusiveness from the point of view of those to whom its prohibitions are addressed*." 227 U.S. at 288. [Emphasis added.]

That the States are not always answerable does not mean that there is no duty. Nor does immunity from suit imply that no "wrong" has been done, but rather, that, as respects those barred from suing, there is no *legally cognizable* wrong which they can have "righted" by the judicial process. See *Kawananakoa* v. *Polyblank,* 205 U.S. 349, 353. In short, the State is an "idealism," sovereign and perfect, only in the sense that there will be no inquiry into the lawfulness of its action in a private suit. Hence, when the United States is plaintiff and the shield of sovereign immunity no longer blinds the eyes of the law, the State itself may be seen to have committed wrongs which require correction. As the court said in the companion *Louisiana* case (No. 67, this Term), *supra,* 225 F. Supp. at 357, "[the] necessary fiction to accommodate the Eleventh Amendment provides no basis for any argument that the State cannot be made a party to this action." See, also, *United States* v. *Fox,* 211 F. Supp. 25 (E.D. La.), affirmed, 334 F. 2d 449 (C.A. 5).[73]

C. JOINDER OF THE STATE WAS APPROPRIATE

Announcing that "the act or practice" of any State official which is alleged to violate Section 1971(a) rights "shall also be deemed that of the State," Section 601(b) accordingly provides that "the State *may*

[73] Cf. *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239, 246, n. 5, where Justice Brandeis stated: "Cases discussing the question of what constitutes a suit against the State within the meaning of the Eleventh Amendment * * * have no bearing upon the power of this Court to protect rights secured by the federal Constitution."

be joined as a party defendant * * *." In our view, this provision for permissive joinder leaves entirely to the Attorney General the determination whether the State will be named as a respondent. But even if his determination could properly be regarded as reviewable, it would be plain that the State of Mississippi was appropriately joined here.

We have already noted (*supra,* p. 60) that, until the present decision, no court had dismissed the State as a party defendant prior to trial. The reason, we suggest, is that normally the question whether there is occasion to join the State cannot be definitively resolved on the face of the pleadings. In the present case, however, it was clear, from the outset, that the State of Mississippi was an appropriate defendant. First, the complaint challenges the validity of the State Constitution and laws of statewide application. On this score alone, the State is an interested party, as the requirement of a three-judge court and notice to its governor and attorney general suggests. See 28 U.S.C. 2281, 2284(2). Second, the complaint charges discrimination not only by the named individual defendants, but by a host of Mississippi officials throughout the State for three-quarters of a century. The burden of the defense (if one can be made) appropriately falls on the State itself. And, finally, the prayer seeks statewide relief, not confined to the counties whose registrars are joined (see *infra,* pp. 91–96). Plainly, no fully effective remedy can be given unless the State, in all its governmental operations, is enjoined from abridging rights guaranteed

by the Fifteenth Amendment and its implementing legislation.

In sum, whatever the proper rule in another case, this is unmistakably an appropriate occasion for the joinder of the State itself as a party defendant. As Judge Brown stated in the dissenting opinion below, "[the] contest is a big one. It is no little controversy between one or more individual Negro voters and individual Registrars. It is between all Negro adults and the State. Indeed, it is between all citizens of the United States and the State. In that setting it is fitting that the protagonists appear to be what they really are—the United States and the State of Mississippi" (R. 1566).

III

THE MEMBERS OF THE BOARD OF ELECTION COMMISSIONERS AND THE COUNTY REGISTRARS WERE PROPERLY JOINED AS DEFENDANTS

After dismissing the State, the court below went on to hold that most of the other defendants were also improper parties. The ruling with respect to the members of the Mississippi Board of Election Commissioners was that their role in the alleged voting discrimination was insufficient to warrant their joinder (R. 1532–1534). Whereas the county registrars were apparently viewed as real defendants (R. 1534), the majority held their joinder in a single action impermissible (R. 1535) and found venue lacking as to four of the six (R. 1536). Presumably, if the action had not been dismissed on other grounds, the court would have severed the claims against each registrar, and transferred all but two for trial in different dis-

tricts or divisions. See Rule 21, F. R. Civ. P.; 28 U.S.C. 1406(a). These rulings, we submit, are plainly erroneous.

A. THE STATE ELECTION COMMISSIONERS WERE PROPERLY JOINED

The provision of the Judicial Code requiring the convening of a three-judge court when the "enforcement, operation or execution" of a State statute is sought to be enjoined assumes that the result may be accomplished "by restraining the action of any officer of such State in the enforcement or execution of such statute." 28 U.S.C. 2281. There is no requirement that relief be sought, or granted, only against the one official most immediately engaged in administration of the challenged law. On the contrary, it is well settled that a three-judge court may properly enjoin all those charged with executing an unconstitutional statute. *Bevins* v. *Prindable,* 39 F. Supp. 708 (E.D. Ill.), affirmed *per curiam,* 314 U.S. 573; *Orleans Parish School Board* v. *Bush, et al.,* 268 F. 2d 78, 80 (C.A. 5). See, also, *James, et al.* v. *Almond, et al.,* 170 F. Supp. 331, 341 (E.D. Va.), appeal dismissed, 359 U.S. 1006; *Evans, et al.* v. *Members of the State Board of Education, et al.,* 149 F. Supp. 376, 378 (D. Del.), affirmed *sub nom. Evans* v. *Buchanan,* 256 F. 2d 688 (C.A. 3), certiorari denied, 358 U.S. 836. The State Election Commissioners (as one might assume) have an important role in the administration of the Mississippi statutory and constitutional provisions under attack. They were properly joined.

The principal duty of the State Board of Election Commissioners (which consists of the Governor, the Secretary of State, and the Attorney General)[74] is preparation of the application forms, which the Board may revise at any time.[75] The forms and the questions on the forms are a principal issue in this case. These forms implement the challenged provisions of the Mississippi Constitution and laws. Thus, Section 3209.6 of the Mississippi Code[76] specifically directs that the application be "designed to test the ability of applicants for registration to vote, to read and write any section of the Constitution of this State and give a reasonable interpretation thereof, and demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government; and to demonstrate to the county registrar that applicant is a person of good moral character as required by section 241–A of the Constitution of Mississippi."[77]

[74] Section 3204, Miss. Code.

[75] The Board also is authorized by section 3204 of the Mississippi Code to appoint three election commissioners for each county; and formally to appoint the local registrar, who is the clerk of the local circuit court, unless the Board determines the clerk is an "improper person" (Sections 3204, 3206, Miss. Code). The Board also appoints deputy registrars. Section 3206, Miss. Code.

[76] See, also, Section 244 of the Mississippi Constitution and section 3213(1), Miss. Code, containing the requirement that the application form exhibit the necessary qualifications.

[77] The Section also directs that the application forms are to include the oath required by section 242 of the Mississippi Constitution, and certain prescribed information including the date of registration, the name, age, and occupation of the applicant, his employer, his past and present residences, and whether he had been convicted of any disqualifying crime.

Since the complaint seeks to restrain further use of these tests, and to require the registration of all Negroes who meet specified qualifications, full relief would appropriately include an injunction directing the members of the State Board to omit from the forms questions designed to exhibit the qualifications nullified by the court decree. The registrars could then freely comply with the injunction, without resolving a possible conflict between the court order and directives of the Board, which has the power to remove a registrar if he is an "improper person." Section 3204, Mississippi Code. Cf. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42 (E.D. La.), affirmed, 365 U.S. 569; *id.,* 188 F. Supp. 916, 928–929, affirmed, 365 U.S. 569; *id.,* 190 F. Supp. 861, 865–866, affirmed, 366 U.S. 212; *id.,* 191 F. Supp. 871, 873–875, affirmed, 367 U.S. 908. See, also, *United States* v. *Barnett,* 376 U.S. 681, 684.

B. JOINDER OF THE REGISTRARS WAS PROPER

Rule 20(a) of the Federal Rules of Civil Procedure provides:

> * * * [a]ll persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, *any* right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. * * *.

These requirements are satisfied here. *First,* questions of law common to all the registrars will arise in

the action because it is claimed that each registrar is administering, in common with the others, a particular set of unconstitutional laws. *Second,* there is asserted against the registrars a right to relief "in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences." If the "transaction" or "occurrence" is viewed as the legislative enactment of an unconstitutional law, the relief asserted relates to the same "series of transactions or occurrences", namely the enactment of the various constitutional and statutory provisions involved. If, on the other hand, the relevant transaction or occurrence is viewed, more technically, as the use by each defendant of the challenged laws, these "occurrences" are nevertheless part of "a series", all contributing to the enforcement of the same challenged laws.[78]

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[78] An apt analogy is provided by judicial construction of Rule 13(a), F.R. Civ. P., which provides in pertinent part that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if [*inter alia*] it arises out of *the transaction or occurrence* that is the subject matter of the opposing party's claim * * * " (emphasis added). The courts have given a liberal construction to the underscored language. *E. J. Korvette Co.* v. *Parker Pen Co.*, 17 F.R.D. 267 (S.D. N.Y.); *Phelan* v. *Middle States Oil Corp.*, 124 F. Supp. 728 (S.D. N.Y.), appeal dismissed in part and cause remanded in part on other grounds, 210 F. 2d 360, affirmed, 220 F. 2d 593 (C.A. 2), certiorari denied *sub nom. Cohen* v. *Glass* 349 U.S. 929; *Rosenthal* v. *Fowler*, 12 F.R.D. 388 (S.D. N.Y.); 3 Moore's *Federal Practice*, paragraph 13.13, p. 33 (2d ed.). A counterclaim is compulsory within the meaning of Rule 13(a) if it bears a "logical relationship" to an opposing party's claim. *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610; *National Equipment Rental Ltd.* v. *Fowler*, 287 F.2d 43, 45 (C.A. 2); *Great Lakes Rubber Corp* v. *Herbert Cooper*

In the typical case in which the constitutionality of a State voter registration law is challenged, only one official or agency is named as a defendant because the claimant, in order to obtain effective relief, need sue only the local official who has enforced or threatens to enforce the law against him. See, *e.g., Lassiter* v. *Northampton Election Board,* 360 U.S. 45; *Davis* v. *Schnell,* 81 F. Supp. 872 (S.D. Ala.), affirmed, 336 U.S. 933. But if the plaintiff is aggrieved by the enforcement of the law in several different localities, it is obviously desirable to avoid a multiplicity of suits by joining the officials who enforce the law in those localities as defendants in a single action. See *e.g., Bevins* v. *Prindable, 39 F. Supp.* 708 (E.D. Ill.), affirmed, *per curiam,* 314 U.S. 573. Here, of course, the claim is not made on behalf of one individual, or the inhabitants of a single community. The interest of the United States reaches the enforcement of the allegedly unconstitutional statutes wherever and by whomever

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Co., 286 F. 2d 631, 634 (C.A. 3). "[A] counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of efforts and time by the parties and the courts." *Ibid.* The same considerations should apply in determining whether parties defendant are properly joined. See *Eastern Fireproofing Co.* v. *U.S. Gypsum Co.*, 160 F. Supp. 580 (D. Mass.); 2 Barron and Holtzoff, *Federal Practice and Procedure* (Rules ed.) § 533. (Cf *Dombrovskis* v. *Murff*, 24 F.R.D. 302, 304 (S.D. N.Y.) (proposed amendment of complaint alleging that multiple plaintiffs' several constitutional rights were denied by the defendant official's application of unconstitutional standards and procedures to each of them meets the requirements of Rule 20, which sets forth the same criteria for joinder of plaintiffs as for joinder of defendants); *Silverman* v. *Cinofsky*, 15 F.R.D. 122, 123, (N.D. Ill.).

they may be applied. In the circumstances, it is plainly appropriate to join in one suit all those against whom there is specific evidence of illegal action."[76] Since joinder was permissible, venue was proper as to each of the registrars. 28 U.S.C. 1392(a), 1393(b).

IV

THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

As we have elaborated in the Statement (*supra*, pp. 3–8), the complaint filed by the United States challenged the constitutionality of the "interpretation" and "citizenship" tests and the "good moral character" requirement imposed on applicants for voting registration by the Mississippi Constitution (§§ 244, 241–A, *infra*, pp. 106–107), implementing legislation (Miss. Code, §§ 3213, 3209.6 and 3212.5, *infra*, pp. 107–111) and related recent statutes which require the applicant to complete, unaided, a letter-perfect form (§ 3213, *infra*, p. 108), provide for publication of the applicant's name (§ 3212.7, *infra*, p. 111), invite challenges to his "moral character" and other qualifications (§§ 3217–07 through 3217–15, *infra*, pp. 112–115), forbid disclosure to the applicant of the reasons (other than lack of "good moral character") for his disqualification (§ 3212.5, *infra*, pp. 110–111), and,

[76] Since "the convenience of the parties and the court can be fully protected, through joinder is allowed, by separate trials, pursuant to Rule 42(b), * * * it seems practically desirable to give the broadest possible reading to the permissive language of Rule 20." 2 Barron and Holtzoff, *Federal Practice and Procedure* § 533.

finally, authorize destruction of voting records which Title III of the Civil Rights Act of 1960 (42 U.S.C. 1974), requires the registrar to preserve (§ 3209.6, *infra,* pp. 107–108). In each instance, and with particularity, the complaint charged that the guiding purpose of the enactment was to effect or facilitate the disfranchisement of Negroes, that the provisions had so worked or had been so used, and that this result has, in fact, been accomplished. Nor did the government rest on the somewhat conclusory allegations of the complaint; it filed voluminous answers to interrogatories substantiating the charges in massive detail (R. 388–1407; see Statement, *supra,* pp. 10–33). Nevertheless, the court below dismissed the case before trial, on the ground that the complaint "fails to state a claim upon which any relief can be granted" (R. 1563, 1564).

It goes without saying, as the majority below apparently recognized (R. 1509), that the allegations of the complaint must be accepted as true on a motion to dismiss (*e.g., Gomillion* v. *Lightfoot,* 364 U.S. 339), and that dismissal, at this stage, is proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U.S. 41, 45–46. Nor is there room for disregarding the allegations as "conclusory" in light of the detailed factual responses to interrogatories submitted by the government. Though not evidence, these answers at least demonstrate that the complaint is not a mere catalogue of "empty charges." As Judge Brown noted in

his dissent (R. 1582), they are "the best proof that the Government has at least an arguable basis for establishing its claim." It follows that the decision below must rest on a wholesale rejection of the theory of the complaint, even assuming all its allegations can be proved.

A. THE ESSENTIAL CHARGES OF THE COMPLAINT AND THEIR SUFFICIENCY

We begin with the self-evident proposition that, notwithstanding the originally absolute power of the States to prescribe the qualifications for voting in non-federal elections (later subject to a potential apportionment penalty under the second Section of the Fourteenth Amendment), the Fifteenth Amendment (and 42 U.S.C. 1971(a))[80] invalidates every provision of the constitution or laws of a State which "denies or abridges" the right to vote "on account of race." See *United States* v. *Reese,* 92 U.S. 214, 217–218. Of course, State laws which, in terms, bar Negroes from the franchise fall before the Amendment. *Neal* v. *Delaware,* 103 U.S. 370, 389. But the constitutional guarantee does not end there: "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." *Lane* v. *Wilson,* 307 U.S. 268, 275. See, also, *Guinn* v. *United States,*

[80] As previously noted, § 1971(a) has at least as broad a scope as the Fifteenth Amendment. For that reason, we often speak of the challenged Mississippi provisions as "violating the Fifteenth Amendment" as a convenient shorthand for the technically more correct allegation that the offending laws are nullified by the Supremacy Clause because they conflict with § 1971(a) which, so far as here relevant, merely codifies in statutory form the guarantees of the Fifteenth Amendment.

238 U.S. 347. In short, no State rule fixing voting qualifications is insulated against the charge that it works a discrimination "on account of race." Though the fashioning of such qualifications and the implementing procedures (ignoring their effect on "federal" elections)[81] normally involve the exercise of power wholly within the domain of State interest, there is no insulation when that "power is used as an instrument for circumventing [the] federally protected right [to exemption from racial discrimination in voting]." *Gomillion* v. *Lightfoot,* 364 U.S. 339, 347. Such a charge of misuse of State authority involves "basic civil and political rights" and accordingly "must be carefully and meticulously scrutinized," *Reynolds* v. *Sims,* 377 U.S. 533, 562. In this light, we re-examine the allegations of the complaint and the theory upon which they rest.

1. The "interpretation," "citizenship" and "good moral character" tests

(*a*) In 1890, eligible Negro voters exceeded whites. To remedy that situation, a constitutional convention was called in that year, and, under circumstances

[81] Though the Mississippi voter registration provisions involved are equally applicable to "federal" and local elections, the challenge here, with two exceptions (the voting records destructions statute, alleged to be in conflict with 42 U.S. Code 1974, and the "perfect form" requirement, alleged to conflict with § 101(a) of the Civil Rights Act of 1964), is under section 1971(a), which (so far as here relevant) implements the Fifteenth Amendment's general ban on racial discrimintion in voting, rather than the congressional prerogative to "make or alter—regulations" with respect to "[t]he times, places and manner of holding elections for Senators and Representatives" (Art. I, § 4). Accordingly, there is no occasion to consider the special limitations on State laws affecting so-called "federal" elections. See cases cited in note 56, *supra.*

which we need not investigate, the convention assembled with 133 white delegates and only 1 Negro. There can be no quibble about its central purpose to disfranchise the Negro. All of the other indications already detailed to one side, we may accept the opinion of the Mississippi Supreme Court, writing in 1896 (*Ratliff* v. *Beale*, 774 Miss. 247, 266, 20 So. 865, 868):

> It is in the highest degree improbable that there was not a consistent, controlling directing purpose governing the convention by which these schemes [the adoption of various provisions intended to place political control in the hands of white persons] were elaborated and fixed in the constitution. *Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the Negro race.* * * * [Emphasis added.]

One of the expedients—and among the most effective—was Section 244 of the Constitution, which, in its original form, required that a voter be able to read, understand or interpret any section of the State constitution. The provision (it is charged) was designed to take advantage of the relative ignorance of the Negro, recently emerged from slavery, and, where necessary, to provide local registrars with a very flexible instrument for discrimination. At the same time, the quantity and quality of public education for the Negro, fully segregated, was kept inferior.

The plan succeeded. By 1954, all but about 5% of the Negro population of voting age were disfranchised (as compared to 63% registration for the whites) (R. 4). Though continued educational disparities played a role, the result is attributable largely to the misuse of the "interpretation" test by registrars. The requirements were often waived altogether for the white registrant; whereas the Negro was commonly required to read *and* interpret a section of the State constitution. See *Peay* v. *Cox*, 190 F. 2d 123 (C.A. 5), certiorari denied, 342 U.S. 896. But, even short of such extreme practices, the absolute discretion vested in the registrar as to which provision to use in the test, and his position as sole judge of the sufficiency of the answer, invited discrimination. The charge is that those opportunities for abuse were not wasted. And, of course, these known practices often discouraged Negroes from even attempting to register. See *United States* v. *State of Louisiana*, 225 F. Supp. 353, 397 (E.D. La.), appeal pending, No. 67, this Term; *United States* v. *Manning*, 215 F. Supp. 272, 288 (W.D. La.).

In 1955, after a previous unsuccessful effort and in response to an openly racial campaign by white Citizens Councils (disturbed by the ruling in *Peay* v. *Cox, supra,* and by a new interest on the part of the Negro community in the political process), Section 244 of the Mississippi Constitution was amended with a view to multiplying the hurdles to Negro voting registration. The provision was approved by an electorate more than 95% white. Every new applicant for registration—but not those (mostly white) already registered— was required to be able to read *and* write *and* interpret a section of the State Constitution, and

to "demonstrate a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government." The vagueness of the now mandatory "interpretation" test—as opposed to a mere literacy test—is obvious. See *Davis* v. *Schnell, supra,* 81 F. Supp. at 877–878. Cf. *United States* v. *L. Cohen Grocery Co.,* 255 U.S. 81, 89; *Cline* v. *Frink Dairy Co.,* 274 U.S. 445, 453. In light of the registrar's discretion to select from among 285 sections of the Mississippi Constitution, of widely varying complexity, and his power to judge the adequacy of the "interpretation," the opportunities for abuse were enormous. And, as the Statement details, instances of discrimination are not lacking. See, also, *United States* v. *Lynd,* 301 F. 2d 818, 822 (C.A. 5), certiorari denied, 371 U.S. 893;[82] *United States* v. *Lynd,* No. 19,576, C.A. 5, decided July 15, 1963;[83] *United States* v. *Duke,* 332 F. 2d 759, 768 (C.A. 5).[84] The test also capitalizes—in a far greater degree

[82] "Although we do not here repeat the test of the several sections given to the Negro witnesses and those given to the white witnesses, a reading of them demonstrates beyond any question that by any objective standard those supplied to the Negro applicants were longer, more complicated, and more difficult."

[83] "From April 18, 1962 through June 21, 1962, Theron C. Lynd gave Negroes more difficult sections of the Constitution to interpret than those he gave to white persons" (quoted at R. 1137).

[84] "Much more difficult sections of the Constitution were given to the Negroes to write and construe [by the registrar of Panola County, Mississippi] than those given to the white applicants." See, also, *United States* v. *Wood,* C.A. No. 1656, S.D. Miss., October 25, 1963, appeal pending No. 21212 (C.A. 5); *United States* v. *Ward,* C.A. No. 2540, S.D. Miss., temporary restraining order entered April 21, 1962, appeal pending, No. 21717 (C.A. 5); *United States* v. *Cox,* No. D–C–53–61, N.D. Miss., June 24, 1964.

than a "straight" literacy requirement would—on the inferior public education provided Negroes. Cf. *Lane* v. *Wilson, supra,* 307 U.S. at 276;[85] *Parker* v. *Franklin,* 223 F. Supp. 724 (M.D. Ala.), modified and affirmed, 331 F. 2d 8841 (C.A. 5).[86]

The license for discrimination embodied in the new "citizenship" test is even more obvious. The phrase "duties and obligations of citizenship under a constitutional form of government" is so indefinite as to be incomprehensible. A "constitutional form of government" presumably means a government with a supreme law, which all officials are bound to obey. But, obviously, the duties and obligations of a citizen under such a form of government will depend upon what is in the constitution. On the other hand, if more is meant, the answer—elusive to the legal mind—is surely not apparent even to the most intelligent layman.

As we have seen (Statement, *supra,* pp. 26–27); on the day before the Civil Rights Act of 1960 was signed into law, the Mississippi Legislature proposed

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[85] In testing procedural hurdles to registration in *Lane*, the Court noted:

"The restrictions imposed must be judged with reference to those for whom they were designed. It must be remembered that we are dealing with a body of citizens lacking the habits and the traditions of political independence and otherwise living in circumstances which do not encourage initiative and enterprise."

[86] There, the Negro plaintiff was a graduate of Alabama State College from which he had received a bachelor of arts degree. He sought admission to Auburn University—an Alabama State institution—in order to obtain a master's degree, but was refused admission solely on the grounds that he had not obtained

the provision that was to become Section 241–A of the Mississippi Constitution, requiring an applicant for voting registration to satisfy the registrar that he is a person "of good moral character." The allegation is that this obviously vague standard was designed to offer registrars a further instrument for discrimination. The timing and the setting of the new provision support the charge. As implemented by later legislation (Miss. Code, §§ 3213, 3209.6, 3212.5), the requirement is expressly waived for those previously

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his undergraduate degree from an accredited educational institution. Alabama State College was one of only two state colleges at which Negroes were permitted to attend. Neither was accredited. The other seven state-operated colleges were all accredited but refused to admit Negroes. The defendant argued that the requirement of graduation from an accredited institution was a non-discriminatory and necessary educational standard. But the district court rejected this reasoning, stating 223 F. Supp. at 726:

"* * * the State of Alabama has denied to Harold A. Franklin, a Negro—solely because he is a Negro—the opportunity to receive an undergraduate education at an accredited state college or university; * * *. On its face, and standing alone, the requirement of Auburn University concerning graduation from an accredited institution as a prerequisite to being admitted to Graduate School is unobjectionable and a reasonable rule for a college or university to adopt. However, the effect of this rule upon Harold A. Franklin—an Alabama Negro—and others in his class * * * is necessarily to preclude him from securing a postgraduate education at Auburn University solely because the State of Alabama discriminated against him in its undergraduate schools. Such racial discrimination on the part of the State of Alabama amounts to a clear denial of the equal protection of the laws. This is true regardless of the good motives or purposes that Auburn University may have concerning the rule in question."

registered, most of whom are whites. The allegation is that, whatever its validity in other contexts, the qualification—wholly undefined as it is here[87]—announces too indefinite a standard, too susceptible of abuse, to stand as a valid restriction on the precious right of the franchise.[88]

We have already detailed the package of legislation enacted in 1962 (see Statement, *supra*). Here, too, the charge is that these measures were designed to facilitate discrimination and discourage Negro applicants. And, again, the tendered proof shows how effectively they were so used.

One of the new provisions, in effect, requires the applicant to complete a letter-perfect form without

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[87] The complaint alleges that the "good moral character" requirement enables and requires the registrars of voters in Mississippi to determine, without reference to any objective criteria (a) what acts, practices, habits, customs, beliefs, relationships, moral standards, ideas, associations, attitudes and demeanor contitute evidence of bad moral character, and what weight should be given to each: (b) what constitutes evidence of good moral character, and what weight should be given to such factors as school record, church membership, military service, club memberships, and personal, social, and family relationship, civic interest and absence of a criminal record; (c) whether the applicant's entire life, or only his recent history, is to be considered, and (d) what sources, if any, such as public records, public officials, or private individuals (Negro and white) will be consulted in determining the character of the applicant, or whether the determination will be made on the basis of personal knowledge, impression, newspaper accounts, rumor or otherwise (R. 12).

[88] Note, 47 Col. L. Rev. 1144, 1146: "the good moral character requirement, while definite enough in fields where no specific constitutional mandate exists, may here be objectionable because of * * * [its] failure to establish a sufficiently precise standard for enforcement."

assistance (§ 3213, as amended), while another prohibits the registrar from divulging the error (other than lack of good moral character) on which the rejection is grounded (§ 3212.5). The potential for discrimination in such a procedure is self-evident.[89]

(*b*) The provisions just discussed invite discrimination by those responsible for their administration, either by delegating authority in vague and indefinite terms, or by permitting registrars to disqualify applicants for formal, technical or inconsequential errors. It is charged, moreover, that they are designed and calculated to achieve that result and that in fact they have been systematically employed to that end for a period of years, if not generations. There can be no quarrel with the proposition that individual officials who have engaged in particular instances of discrimination in exercising the broad authority conferred upon them by such laws may be required to desist from future acts of discrimination. So much is indeed acknowledged in the opinion of the majority below (R. 1547). There remains for consideration this question: If, as charged, the underlying laws themselves are the root of the discrimination, may the dis-

[89] We also point out that the "perfect form" requirement now conflicts with Section 101(a) of the Civil Rights Act of 1964, which forbids a denial of voting rights because of errors or omission on the registration form which are "not material in determining whether such individual is qualified under State law to vote * * *." Since "the case must be decided on the basis of the law now controlling," *United States* v. *Alabama*, 362 U.S. 602, the district court should be directed on remand to permit the complaint to be amended so as to allege a conflict between Section 3213 and the Civil Rights Act of 1964, and to strike down the State provision to the extent of the inconsistency.

trict court entertain a proceeding against the State—one which seeks to enjoin it and its subordinate officials from continuing to proceed under those laws, and thus to extirpate root and branch the long flourishing system of discrimination?

Our answer is that if the government makes the showing foreshadowed in its complaint, it will become the district court's duty to condemn the underlying provisions of law (not merely instances of discrimination by particular local officials) and to enjoin their enforcement. Where a statute can be seen to breed and sanction official discrimination, because its generalities invite disparate treatment, or where the regular and generalized course of administration by the State's officers has long given it an accepted meaning which renders it incompatible with constitutional guarantees, the remedy must reach the cause.

The rule is well established that a statute or ordinance is invalid if it invests an administrator with uncanalized discretion to grant or deny fundamental rights. *Lovell* v. *Griffin*, 303 U.S. 444, (distribution of literature); *Schneider* v. *State*, 308 U.S. 147 (door to door solicitation); *Niemotko* v. *Maryland*, 340 U.S. 268 (use of park for public meetings). Recently, in *Staub* v. *City of Baxley*, 355 U.S. 313, the Court applied the rule to an ordinance which prohibited soliciting members for a labor organization without a license from the Mayor and Council who, in passing upon an application, were to consider (*id.* at 315) "the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of the

citizens." In invalidating the ordinance the Court said (355 U.S. at 322):

> It is settled by a long line of decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official * * * is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

The principle is neither new nor confined to cases under the First Amendment. Cf. *Chy Lung* v. *Freeman*, 92 U.S. 275. It was applied eighty years ago to municipal ordinances vesting in administrative authorities an arbitrary discretion to license or refuse to license the conduct of a laundry business. In *Yick Wo* v. *Hopkins*, 118 U.S. 356, the Court invalidated, partly upon this ground, an ordinance of San Francisco calling for the licensing of laundries. It quoted with approval from *City of Baltimore* v. *Radecke*, 49 Md. 217, where the Maryland Court of Appeals had struck down as invalid on its face a similar ordinance applicable to the use of steam engines (118 U.S. at 372–373):

> It [the ordinance in question] lays down no *rules* by which its *impartial execution* can be secured or partiality and oppression prevented * * * when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being brought under cover of such a

> power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the *domain of law,* and we are constrained to pronounce it inoperative and void.

The principle is also applicable to voting rights. See *Williams* v. *Mississippi,* 170 U.S. 213, 224–225; *Davis* v. *Schnell,* 81 F. Supp. 872, 877–878, affirmed, 336 U.S. 933; *United States* v. *Louisiana,* 225 F. Supp. 353, 387. And it is enough to condemn the Mississippi voting laws. When the registrar is free to choose from the 285 sections of the Mississippi Constitution of widely varying complexity the test which he will put to a particular applicant and then to judge whether the applicant's understanding and interpretation are satisfactory, the registrar exercises virtually untrammeled power to qualify or disqualify prospective voters at will. The new "citizenship" test requiring the registrant to demonstrate an understanding of the "duties and obligations of citizenship under a constitutional form of government" serves to enlarge the power of the registrar still further, for the sufficiency of any demonstration within the wide range of conceivable extremes is left wholly to the registrar's discretion. Similarly, the test of "good moral character," as applied to voting, leaves excessive scope for judgment.

Nor does the possibility that a case might arise in which mandamus would lie against the registrar prove that the standards are sufficient, as the court below

supposed (R. 1552). The question is not whether the power is absolute, but whether it is sufficiently governed by law to protect the fundamental right to vote against arbitrary or invidious discrimination.

In the present case, however, as in *Yick Wo* v. *Hopkins* (118 U.S. at 373), "we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration." For, here as there, "the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

Such was the case made by the goverment's complaint against Mississippi, the proof of which is foreshadowed by the answers to interrogatories. See pp. 10–33, *supra*. The difference is only that we deal with the Fifteenth Amendment and the right to vote—the most fundamental of all rights—rather than the Fourteenth and carrying on a business. But since the

difference makes our case the stronger, the conclusion of the Court is squarely applicable (118 U.S. at 373–374):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

While it has been suggested by the court below that *Yick Wo* left unaffected the San Francisco ordinance and only proscribed its unconstitutional administration, that conclusion seems wrong. At least, this Court has consistently read it as we do. See *Williams* v. *Mississippi*, 170 U.S. 213, 224;[90] *Atchison, Topeka & Sante Fe Railroad Co.* v. *Matthews*, 174 U.S. 96, 105;[91] *Home Tel. & Tel. Co.* v. *Los Angeles*,[92] 227 U.S.

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[90] "The ordinances were attacked as being void on their face, and as being within the prohibition of the Fourteenth Amendment, but even if not so, that they were void by reason of their administration. *Both contentions were sustained* (emphasis added)."

[91] "In that case [*Yick Wo*] a municipal ordinance of San Francisco designed to prevent the Chinese from carrying on the laundry business was adjudged void."

[92] "In *Yick Wo* v. *Hopkins*, 118 U.S. 356, the enforcement of certain city ordinances was prohibited on the grounds that they were within the reach of the Fourteenth Amendment. The court, reiterating the doctrine of *Virginia* v. *Rives* and *Ex Parte Virginia*, held that this conclusion was sustained from a two-fold point of view—first, the terms of the ordinances and second, in any event from the discriminatory manner in which the ordinances were applied by the officers."

278, 291; *Gudling* v. *Chicago*, 177 U.S. 183, 186–187.[93]

We recognize that the unauthorized action of one or more officials is not alone enough to invalidate a statute fair on its face, but that principle, upon which the court below relied, is inapplicable to the present case for several reasons.

In the first place, as we have just shown (pp. 76–78), the statutes in question could well be held void on their face because of the excessive delegation of virtually untrammelled control of the franchise.

Second, we are not dealing with the conduct of one or two officials or the isolated acts of a larger number. The case made in the complaint is one of systematic discrimination on a broad front for two or three generations. The practice would have written meaning into the State constitution and statutes even if it were not there from the beginning. It demonstrates that the power given to the registrars is in fact as arbitrary as one would infer from the words.[94]

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[93] See, also, *Crowley* v. *Christensen*, 137 U.S. 86, 94; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 725, 739, 762; *Plessy* v. *Ferguson*, 163 U.S. 537, 550; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 694–695; *Goriеb* v. *Fox*, 274 U.S. 603, 607–608.

[94] A like principle governs in other areas. With respect to discrimination in rates, this Court said in *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U.S. 362, 369:

"Here, according to petitioner's own claim, all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the

Third, other provisions in the Mississippi constitution and statutes are themselves so obviously calculated to work discrimination against Negroes as to compel the conclusion that the vague phrases relating to understanding and interpretation, the duties of a citizen and good moral character were intended to be used as part of a program for defeating rights under the Fifteenth Amendment. This is true of the 1890, 1955 and 1960 Constitutional amendments. Thus, as the Mississippi Supreme Court itself noticed a few years later (*Ratliff* v. *Beale, supra,* 74 Miss. 247 at 266), the 1890 constitutional convention "swept the circle of expedients to obstruct the exercise of suffrage by the negro race" and intentionally "discriminate[d] against its characteristics," among other things, by selecting as disqualifying crimes "the offenses to which its criminal members are prone." Because Negroes were thought "given rather to furtive offenses than to the robust crimes of the whites," *id.* at 266, the constitution bars from the franchise those convicted of bribery, burglary, theft, arson, perjury, forgery, embezzlement and bigamy, but not armed robbers or rapists or murderers. See Miss. Const., Section 241; see, also, Section 253. And, at the other end of the history are the publication and challenge

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statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. The Equal Protection Clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text."

provisions enacted in 1962 which are plainly calculated to inhibit the registration of Negroes by advertising their applications and exposing them to harassment and intimidation (*infra*, pp. 90–91).

Finally, it is plain that the practical administration of the statute conformed to the original intent. As we have already seen (*supra*, pp. 20–22), the charge (often substantiated by the specific findings of federal courts) is that the "interpretation" test, once applied only to Negro applicants, has been administered unfairly, Negroes being generally given more difficult portions of the State constitution to construe and being judged far more critically on their answers. And similar discrimination in fact is alleged with respect to the grading of the "citizenship" test and the standards used to determine "good moral character."

Under these circumstances the Mississippi constitution and statutes cannot be divorced from the systematic violation of Fifteenth Amendment rights of which they are the source. Not only the discriminatory practices but any steps under the laws conferring such flexible and arbitrary power should therefore be enjoined.[35]

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[35] An analogous rule often governs questions of relief. For instance, the fact that methods of doing business used by the defendants could have been lawfully used does not save them from condemnation when in fact they have been employed, together with other practices, to achieve forbidden ends. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 188; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89; *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 724; *Swift & Co.* v. *United States*, 276 U.S. 311.

2. The records destruction statute and the publication and challenge provisions

(*a*) In 1960, also, and (it is charged) with a view to the imminent passage of the Civil Rights Act of 1960, the Mississippi legislature adopted a measure expressly permitting local registrars to destroy records which, formerly, they were required to keep (Miss. Code, § 3209.6). Plainly, the allegation of impermissible purpose is not unreal in light of the demonstrated importance of records in proving discrimination. But, in any event, the statute falls as contrary to the national law, 42 U.S.C. 1974. Although the Mississippi statute does not command disobedience of the federal law, there can be no doubt that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67; *Hill* v. *Florida,* 325 U.S. 538; cf. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U.S. 714, 722. The open encouragement which the local provision, on its face, gives to disregard of the federal law, and the charge of the complaint that records have actually been destroyed under the supposed authority of the State law, make clear that the allegation of conflict is substantial.

(*b*) Finally, one of the most obviously offensive provisions of the 1962 package is the requirement for publication of the names of applicants for voting registration, combined with an invitation to the public to challenge their qualifications (Miss. Code, §§ 3212.7, 3217–01 through 3217–15). We need hardly expatiate on the inhibiting effect of such a system,

in the light of the instances of intimidation and reprisal already recited (Statement, *supra*, —) and the notorious "private attitudes and pressures"—which courts may properly notice[96] (*Anderson* v. *Martin*, 375 U.S. 399, 403; *NAACP* v. *Alabama*, 357 U.S. 449, 463), indeed, cannot ignore (*NAACP* v. *Button*, 371 U.S. 415, 435–436). See, also, *Bates* v. *Little Rock*, 361 U.S. 516; *Louisiana* v. *NAACP*, 366 U.S. 293, 296; *Gibson* v. *Florida*, 372 U.S. 539; cf. *Shelton* v. *Tucker*, 364 U.S. 479, 487.

We conclude that a cause of action has been fully stated, and that, if more were needed, the likelihood of very substantial proof has been demonstrated.

C. THE RIGHT TO RELIEF UPON PROOF OF THESE CHARGES

Of course, if the government prevails in its challenge to the Mississippi constitutional and statutory provisions involved, it will be entitled to a judgment declaring them unconstitutional and enjoining their enforcement throughout the State. Since the availability of *some* relief is sufficient to sustain the claim against a

[96] See United States Commission on Civil Rights, Interim Report on Mississippi, April 16, 1963. In its 1961 Report on voting, the Commission had reported that methods of disfranchisement of Negroes in 14 Mississippi counties studied by the Commission included economic and physical reprisals. Wiley Branton, director of the Voter Registration Project sponsored by the Southern Regional Council charged in March 1963 that Mississippi used "economic pressures, threats, coercion, physical violence and death" to deter Negro registration efforts. See Silver, *The Closed Society*, pp. 91–92. See, also, Report on Mississippi by the Mississippi Advisory Committee to the United States Commission on Civil Rights, January 1963, p. 23; "Law Enforcement in Mississippi" (Special Report of the Southern Regional Council on Mississippi).

motion to dismiss, there would normally be no occasion, at this stage, to consider whether *additional* relief will also be appropriate if the government prevails on the merits. We pursue the question briefly, however, because of the intimations in the majority opinion below that the judgment prayed for could, in no event, be properly entered.

1. "Frecze" of the registration standards

The complaint alleges that most white voters have, in fact, been exempted from the onerous tests and requirements here challenged—either because those provisions were enacted after they had permanently registered, or because they were illegally waived in their case—and that they have obtained a lifetime voting license on satisfying the fundamental requirements (not here attacked) of age, residence, literacy, sanity and absence of conviction of any disqualifying crime. Accordingly, the prayer is that Negroes be permitted to qualify on the same terms, and an injunction is sought to prevent—unless reregistration is required of all—the imposition of any new requirement for registration.

There can be no question of the power of the district court to enter such an order. Its duty is "to do equity and to mould each decree to the necessities of the particular case." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329; *Porter* v. *Warner Co.*, 328 U.S. 395, 398; *State of Alabama* v. *United States*, 304 F. 2d 583, 591 (C.A. 5), affirmed per curiam, 371 U.S. 37; *United States* v. *State of Louisiana*, 225 F. Supp. 353, 396 (E.D. La.), appeal pending No. 67, this Term. Nor

is there any real doubt as to the appropriateness of the remedy for a situation like that alleged here. There is no novelty in the practical solution of requiring a waiver of the law for all when some have been illegally exempted. *E.g., Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239. Cf. *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U.S. 362; *United States* v. *Bausch and Lomb Co.,* 321 U.S. 707; *United States* v. *Gypsum Co.,* 340 U.S. 76; *Ethyl Gasoline Corp* v. *United States,* 309 U.S. 436, 461. And, in the area of voting rights, decrees relieving from the effect of past discrimination "frozen" into a new law have been common since *Guinn* v. *United States,* 238 U.S. 347. See, also, *Lane* v. *Wilson,* 307 U.S. 268, 275–276.[97] In recent years, the courts of the Fifth Circuit have repeatedly enjoined the use of more burdensome tests or stricter standards than those imposed on white voters still eligible to vote. *E.g., United States* v. *Duke,* 332 F. 2d 759, 768 (C.A. 5); *United States* v.

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[97] In *Lane*, the Court stated (307 U.S. at 275–276):

"Section 5652 of the Oklahoma statutes makes registration a prerequisite to voting. By §§ 5654 and 5659 all citizens who were qualified to vote in 1916 but had not voted in 1914 were required to register, save in the exceptional circumstances, between April 30 and May 11, 1916, and in default of such registration were perpetually disenfranchised. Exemption from this onerous provision was enjoyed by all who had registered in 1914. But this registration was held under the statute which was condemned in the *Guinn* case. *Unfair discrimination was thus retained by automatically granting voting privileges for life to the white citizens whom the constitutional 'grandfather clause' had sheltered while subjecting colored citizens to a new burden*" (emphasis added).

Cf. *Lassiter* v. *Northampton Election Board,* 360 U.S. 45, 49–50.

Dogan, 314 F. 2d 767, 772–773 (C.A. 5); *United States* v. *Lynd*, 301 F. 2d 818, 823 (C.A. 5), certiorari denied, 371 U.S. 893; *United States* v. *Louisiana*, 225 F. Supp. 353, 393 (E.D. La.), pending on appeal, No. 67, this Term; *United States* v. *Penton*, 212 F. Supp. 193, 200 (M.D. Ala). See, also, *United States* v. *Cox*, No. D.C.–53–61, N.D. Miss., June 24, 1964. It is obviously irrelevant whether new and more stringent requirements are devised by the local registrar or the State legislature. In either event, if they exempt a substantial number of present voters registered under more relaxed standards, their application to future applicants should be enjoined. There is in this no usurpation of the State's prerogative to fix the qualifications for voting. For, so long as it treats all alike—by requiring re-registration under the new standards—the State would remain free to enact any non-discriminatory provisions it thought proper.

2. "Pattern or practice" relief under Section 1971(e)

The government seeks a finding that the acts complained of have been "pursuant to a pattern or practice" within the meaning of 42 U.S.C. 1971(e), *infra*, p. 100. Such a finding is the necessary predicate for summary relief from further discrimination affecting members of the same class and, where appropriate, the appointment of federal referees for that purpose. See *United States* v. *Manning*, 215 F. Supp. 272 (W.D. La.).

To be sure, this is not the typical "pattern or practice" case. Previous suits by the United States

in which Section 1971(e) was invoked involved only individual registrars who consistently discriminated against Negro applicants. *E.g., United States* v. *Manning, supra; United States* v. *Mayton,* 335 F. 2d 153 (C.A. 5); *United States* v. *Duke,* 332 F. 2d 759 (C.A. 5). But the broader scope of the present action does not make Section 1971(e) relief inappropriate here. On the contrary, if the allegations of the complaint are proved, it is difficult to conceive how the court could fail to find a "pattern or practice" of discrimination, and the statewide decree would most probably suggest invoking the special relief provisions.

As we have already noted (*supra,* p. 53), the legislative history of Section 1971(e) makes it clear that "a single act such as the enactment of a statute directed at Negroes would in itself constitute a pattern or practice of discrimination." 106 Cong. Rec. 7767.[98] Nor is there any jurisdictional or practical obstacle. Whether or not the requisite finding would normally be entered by a statutory court of three

[98] The statute provides that if the court makes a finding of a pattern or practice, any person of the same race or color who is resident "within the affected area" may apply for an order declaring him qualified to vote. The statute defines "affected area" as meaning "any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a) of this section." But this language does not bar a finding that there has been a pattern or practice of discrimination in the collective subdivisions of a state. The legislative history shows that Congress' concern focused on the existence of established policies of discrimination, wherever they might have occurred.

judges,[99] it is settled that such a court—once properly convened—may properly decide all issues in the case. *Florida Lime and Avocado Growers v. Jacobsen*, 362 U.S. 73.

CONCLUSION

Almost one hundred years ago, it was decreed that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The State of Mississippi complied to the extent of removing explicit racial barriers to the exercise of the franchise. But, it is charged, she erected and maintained other obstacles to the Negro's exercise of the franchise—obstacles which have been raised, rather than lowered, over the years. Though it has long been clear that "[t]he Fifteenth Amendment nullifies sophisticated as well as simple-minded modes of discrimination," the bald fact is that most Negroes residing in the State have been excluded from elections for three-quarters of a century. A suit has now been brought by the United States, pursuant to an express authorization of the Congress, calling into question the laws and practices under which this has taken place. The charges are detailed and the issues are of fundamental importance in a democratic society.

[99] Section 1971(e) is expressly applicable to "any proceeding instituted pursuant to subsection (c) [of section 1971]" to enforce subsection (a) rights and subsection (d) of section 1971 grants to the district courts jurisdiction of "proceedings instituted pursuant to this section." The language of the statute does not limit such proceedings to single-judge district courts.

Section 3213 of the Mississippi Code (as amended by Chapter 570 of the Mississippi Laws of 1962), which requires rejection of an applicant for registration for errors or omissions that are not material in determining voting qualification is, on its face, clearly contrary to Section 101(a) of the Civil Rights Act of 1964 and, accordingly, should now be held unconstitutional.[100]

Section 3209.6 of the Mississippi Code, which permits the destruction of voting records, is, on its face, plainly contrary to Title III of the Civil Rights Act of 1960 (42 U.S.C. 1974), and, accordingly, should now be held unconstitutional.

Sections 3212.7 and 3217-01 through 3217-15 (as added by Chapters 572 and 573 of the Mississippi Laws of 1962), which require publication of the names of applicants for registration and invite voters to challenge their qualifications, in light of the conditions prevailing in Mississippi of which this Court may take judicial notice, plainly inhibit the exercise of the franchise by Negroes, and, accordingly, may now be ripe for adjudication.

While the remaining constitutional and statutory provisions are vulnerable on their face under a strict application of the doctrine announced in *City of Baltimore* v. *Radecke* and *Yick Wo* v. *Hopkins, supra,* the theory of the complaint was that their invalidity would be more fully established when examined in the

[100] Technically, it may be necessary for the district court first to permit the government to amend its complaint so as to allege the conflict. But that formality should not prevent this Court from now determining the issue.

light of the constant and generalized discrimination practiced under them, and, accordingly, we do not urge that the constitutionality of these provisions be decided prior to trial.

The judgment below should be reversed and the case remanded with appropriate instructions.

Respectfully submitted.

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

ARTICLE VI

[Clause 2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * * *

AMENDMENT XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

* * * * *

Federal Statutes:

42 U.S.C. 1971:

(a) All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude;

any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

* * * * *

(c) [Supp. V] Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order. In any proceeding hereunder the United States shall be liable for costs the same as a private person.

Whenever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant and, if, prior to the institution of such proceeding, such official has resigned or has been relieved of his office and no successor has assumed such office, the proceeding may be instituted against the State.

(d) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.

(e) [Supp. V] In any proceeding instituted pursuant to subsection (c) of this section in the event the court finds that any person has been deprived on account of race or color of any

right or privilege secured by subsection (a) of this section, the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such pattern or practice, any person of such race or color resident within the affected area shall, for one year and thereafter until the court subsequently finds that such pattern or practice has ceased, be entitled, upon his application therefor, to an order declaring him qualified to vote, upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. Such order shall be effective as to any election held within the longest period for which such applicant could have been registered or otherwise qualified under State law at which the applicant's qualifications would under State law entitle him to vote.

Notwithstanding any inconsistent provision of State law or the action of any State officer or court, an applicant so declared qualified to vote shall be permitted to vote in any such election. The Attorney General shall cause to be transmitted certified copies of such order to the appropriate election officers. The refusal by any such officer with notice of such order to permit any person so declared qualified to vote to vote at an appropriate election shall constitute contempt of court.

An application for an order pursuant to this subsection shall be heard within ten days, and the execution of any order disposing of such application shall not be stayed if the effect of such stay would be to delay the effec-

tiveness of the order beyond the date of any election at which the applicant would otherwise be enabled to vote.

The court may appoint one or more persons who are qualified voters in the judicial district, to be known as voting referees, who shall subscribe to the oath of office required by section 16 of Title 5, to serve for such period as the court shall determine, to receive such applications and to take evidence and report to the court findings as to whether or not at any election or elections (1) any such applicant is qualified under State law to vote, and (2) he has since the finding by the court heretofore specified been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law. In a proceeding before a voting referee, the applicant shall be heard ex parte at such times and places as the court shall direct. His statement under oath shall be prima facie evidence as to his age, residence, and his prior efforts to register or otherwise qualify to vote. Where proof of literacy or an understanding of other subjects is required by valid provisions of State law, the answer of the applicant, if written, shall be included in such report to the court; if oral, it shall be taken down stenographically and a transcription included in such report to the court.

Upon receipt of such report, the court shall cause the Attorney General to transmit a copy thereof to the State attorney general and to each party to such proceeding together with an order to show cause within ten days, or such shorter time as the court may fix, why an order of the court should not be entered in accordance with such report. Upon the expiration of such period, such order shall be entered unless prior to that time there has been filed with the court and served upon all parties

a statement of exceptions to such report. Exceptions as to matters of fact shall be considered only if supported by a duly verified copy of a public record or by affidavit of persons having personal knowledge of such facts or by statements or matters contained in such report; those relating to matters of law shall be supported by an appropriate memorandum of law. The issues of fact and law raised by such exceptions shall be determined by the court or, if the due and speedy administration of justice requires, they may be referred to the voting referee to determine in accordance with procedures prescribed by the court. A hearing as to an issue of fact shall be held only in the event that the proof in support of the exception disclose the existence of a genuine issue of material fact. The applicant's literacy and understanding of other subjects shall be determined solely on the basis of answers included in the report of the voting referee.

The court, or at its direction the voting referee, shall issue to each applicant so declared qualified a certificate identifying the holder thereof as a person so qualified.

Any voting referee appointed by the court pursuant to this subsection shall to the extent not inconsistent herewith have all the powers conferred upon a master by rule 53(c) of the Federal Rules of Civil Procedure. The compensation to be allowed to any persons appointed by the court pursuant to this subsection shall be fixed by the court and shall be payable by the United States.

Applications pursuant to this subsection shall be determined expeditiously. In the case of any application filed twenty or more days prior to an election which is undetermined by the time of such election, the court shall issue an order authorizing the applicant to vote provisionally: *Provided, however,* That such applicant shall be qualified to vote under State law.

In the case of an application filed within twenty days prior to an election, the court, in its discretion, may make such an order. In either case the order shall make appropriate provision for the impounding of the applicant's ballot pending determination of the application. The court may take any other action, and may authorize such referee or such other person as it may designate to take any other action, appropriate or necessary to carry out the provisions of this subsection and to enforce its decrees. This subsection shall in no way be construed as a limitation upon the existing powers of the court.

When used in this subsection, the word "vote" includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office and propositions for which votes are received in an election; the words "affected area" shall mean any subdivision of the State in which the laws of the State relating to voting are or have been to any extent administered by a person found in the proceeding to have violated subsection (a) of this section; and the words "qualified under State law" shall mean qualified according to the laws, customs, or usages of the State, and shall not, in any event, imply qualifications more stringent than those used by the persons found in the proceeding to have violated subsection (a) of this section in qualifying persons other than those of the race or color against which the pattern or practice of discrimination was found to exist.

* * * * *

42 U.S.C. 1974:

> Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

Civil Rights Act of 1964 (P.L. 88-352), Section 101(a) (amending 42 U.S.C. 1971(a)):

* * * * *

> (2) No person acting under color of law shall

* * * * *

(B) deny the right of any individual to vote in any Federal election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election

* * * * * *

Constitution of the State of Mississippi (1 Mississippi Code Ann.):

§ 241–A. [Supp.] In addition to all other qualifications required of a person to be entitled to register for the purpose of becoming a qualified elector, such person shall be of good moral character.

The Legislature shall have the power to enforce the provisions of this section by appropriate legislation.

§ 244. Every elector shall, in addition to the foregoing qualifications be able to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government.

The person applying to register shall make a sworn, written application for registration on a form to be prescribed by the state board of election commissioners, exhibiting therein the essential facts and qualifications necessary to show that he is entitled to register and vote, said application to be entirely written, dated and signed by the applicant in the presence of the county registrar, without assistance or suggestion from any person or memorandum whatever; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same, upon his oath of

such disability, shall be written at his unassisted dictation by the county registrar.

Any new or additional qualifications herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954.

The Legislature shall have the power to enforce the provisions of this section by appropriate legislation.

Mississippi Statutes: Mississippi Code, Section 3209.6, as amended, 1962:

The state board of election commissioners shall, as soon as practicable and thereafter at such times as it may deem advisable, consistent with the Constitution, prepare a series of application blanks, including the oath of the person offering to register, in compliance with Section 242 of the Constitution of this state, and including blank forms for furnishing of information, showing date of application, which shall be the date of registration if such applicant be approved for registration; name of applicant; age; occupation; where business carried on; if employed, by whom; place of residence; date such residence began; previous place of residence; what oath applicant takes; if more than one person of the same name in precinct, by what name applicant wishes to be called: whether applicant has been convicted, and if so, when and where, of any of the crimes referred to in Section 241 of the Constitution of Mississippi, which are bribery, theft, arson, obtaining money under false pretenses, perjury, forgery, embezzlement and bigamy, and the moral character of applicant; all designed to test the ability of applicants for registration to vote to read and write any section of the Constitution of this state and give a reasonable interpretation thereof, and demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under

a constitutional form of government; and to demonstrate to the county registrar that applicant is a person of good moral character as required by Section 241–A of the Constitution of Mississippi. Such applications shall be designed to exhibit the essential facts and qualifications necessary to show that such person is entitled to register and vote. Copies of such application blank forms shall be delivered to the county registrar of each county, and such copies shall be supplied to each county registrar as needed. The oath required by Section 242 of the Constitution shall be administered by the registrar. The board of supervisors is authorized to make proper allowances for office supplies reasonably necessary by this act.

If no appeal has been or is taken as provided by law from the ruling of the registrar upon any application for registration, or if any application for registration is abandoned or waived by the applicant therein by making another application for registration before any final judgment or decision has been rendered on any prior application, or otherwise waived or abandoned same, the registrar is not required to retain or preserve any record made under the provisions hereof.

Mississippi Laws 1962; Chapter 570 (formerly House Bill 900, now incorporated in Miss. Code, § 3213):

§ *1.* **Person not to register unless he can read and write.** A person shall not be registered unless he be able to read and write any section of the constitution of this state and give a reasonable interpretation thereof to the county registrar. He shall demonstrate to the county registrar a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government; he shall also demonstrate to the county registrar that he is a person of good moral character.

The person applying to register shall make a sworn, written application for registration on a form prescribed by the state board of election commissioners, exhibiting therein the essential facts and qualifications necessary to show that he is entitled to register and vote, said application to be entirely written, dated and signed by the applicant in the presence of the county registrar, without assistance or suggestion from any person or memorandum whatever; provided, however, that if the applicant is unable to write his application by reason of physical disability, the same, upon his oath of such disability, shall be written at his unassisted dictation by the county registrar. As originally enacted each provision is and it is further declared to be mandatory and not directory; no application should have been and shall not be approved or the applicant declared qualified to register to vote unless all blank spaces in the application and the oath are properly and responsively filled out by the applicant; and the oath, as such, shall be signed by the applicant; and the application, as such, shall be signed separately by the applicant at the places thereon provided for applicant's signature.

Provided, however, the provisions herein imposed shall not be required of any person who was a duly registered and qualified elector of this state prior to January 1, 1954; except that from and after the effective date of this act no person shall be permitted to register unless he demonstrates to the county registrar that he is of good moral character as required by the provisions of § 241–A of the Constitution of Mississippi.

§ 2. Should any provision of this act be held to be unconstitutional or otherwise invalid for any reason, such holding shall not be construed to affect the validity of any other part or portion of this act.

* * * * *

Mississippi Laws 1962, Chapter 571 (formerly House Bill 903, now incorporated in Miss. Code, § 3212.5):

§ 1. When the registrar shall have determined that an applicant to register to vote has qualified to register under the Constitution and laws of the State of Mississippi, he shall endorse upon the application the word "passed," or a word or words of equivalent meaning, and the applicant shall be entitled to register upon his request for registration made in person to the registrar, or deputy registrar, if a deputy registrar has been appointed. As is now required by law, no person other than the registrar or a deputy registrar shall register any applicant. It shall be the responsibility of an applicant for registration to make inquiry of the registrar, or the deputy registrar, if a deputy registrar has been appointed, to determine whether such applicant has passed and is qualified to register.

§ 2. If applicant be of good moral character, but has not otherwise complied with the Constitution and laws of this state to entitle him to vote, then the registrar shall endorse upon the application the word "failed," without specifying the reason or reasons therefor, as so to do may constitute assistance to the applicant on another application.

§ 3. If applicant is otherwise qualified to register, but fails to demonstrate to the registrar that applicant is of good moral character and the registrar so finds, the registrar shall endorse upon the application the words "not of good moral character," and shall state the facts or reasons why he finds applicant not to be of good moral character.

§ 4. If applicant is not otherwise qualified under said Constitution and laws and fails to demonstrate that he is of good moral character, then the registrar shall endorse upon the ap-

plication the word "failed," and may endorse thereon the words "not of good moral character," but if he endorses the latter on the application he shall state the facts and reasons why he finds applicant not to be of good moral character.

* * * * *

Mississippi Laws 1962, Chapter 572 (formerly House Bill 822, now incorporated in Miss. Code, § 3212.7):

§ 1. Within ten (10) days after the receipt by the registrar of any application to register to vote and before consideration is given to the sufficiency of the application, the registrar shall deliver for publication in a newspaper hereinafter described the name and address of such applicant as stated in said application and shall cause same to be published once each week for two (2) consecutive weeks in a newspaper having general circulation in the county where such applicant has applied to register, but if no such newspaper is published in such county, then publication shall be made in some newspaper published in an adjoining or other county but of general circulation in the county of the residence of the applicant.

§ 2. The said name and address shall be published in said newspaper under a heading entitled: "Applicants for registration to vote." When said publication shall have been completed, proper proof of publication shall be furnished to the registrar and same shall be preserved as a record of his office. The cost of the publication and proof thereof shall be paid by the county out of its general fund at the rate for legal notices.

§ 3. If within fourteen (14) days, exclusive of the date of the last publication of the name or names aforesaid, after the date of the last publication, no qualified elector of the county,

other than the registrar, shall have challenged, in the manner prescribed by law, the good moral character of applicant and any other requirement which applicant must meet in order to be qualified to register to vote, the registrar shall within a reasonable time, under the circumstances, determine whether applicant has complied with the Constitution and laws of the State of Mississippi to entitle him to register to vote.

* * * * *

Mississippi Laws 1962, Chapter 573 (formerly House Bill 904, now incorporated in Miss. Code, §§ 3217-01-3217-15):

* * * * *

§ 1. The sufficiency and the truthfulness of the statements made in the application to register to vote, and the contents thereof, and the good moral character of an applicant to register to vote are material, and this act is adopted to further enforce the requirements to register to vote as set out in the Constitution and laws of the State of Mississippi.

§ 2. Any qualified elector of the county may challenge the good moral character of any applicant and any other requirement of any applicant to vote within fourteen (14) days after the date of the last publication of the name and address of such applicant by filing with the registrar an affidavit in duplicate setting forth facts upon which the challenge is based. Upon the filing of any such challenge the registrar shall within seven (7) days thereafter, exclusive of the date of the filing of such challenge, send to applicant by certified mail, addressed to him at the address shown on the application, one copy of such affidavit, and notice of the date, time and place where the registrar will hold an administrative hearing to determine the sufficiency of the application or challenge.

§ 3. The registrar, who is an administrative officer of the county in which he serves as registrar, is hereby vested with full power and authority to hold and conduct such administrative hearing and render his decision thereon; he may render his decision at the completion of the hearing or may take the matter under advisement just as a court may do.

§ 4. Such hearing shall be held in the office of the registrar or at some other place designated by the registrar in the county courthouse, and shall be set within a reasonable time after the date of the mailing of said notice. If there be two (2) judicial districts in the county, then the hearing shall be had in the courthouse of the judicial district in which the application to register is made. On his own motion or for good cause shown, the registrar may change the date and time of such hearing. At such hearing by the registrar he may hear oral and documentary evidence in support of, in challenge of, or denial of, the sufficiency of the application, the good moral character of the applicant, and as to any other requirement which applicant must meet in order to be qualified to register to vote.

§ 5. The registrar may issue subpoenas to be served by the Sheriff of the county to secure their attendance as witnesses and the production of documents at such hearing. Obedience to any such subpoena may be secured by the registrar by filing with the Circuit Judge, in term time or in vacation, a petition seeking enforcement, and the person subpoenaed shall obey the order of the Circuit Judge made therein.

The Circuit Judge, in vacation or in term time, is hereby vested with jurisdiction to hear and determine such petition, make proper orders thereon and issue appropriate process, and said petition shall be heard at such time

and place as he may specify on five (5) days' notice to all parties.

§ 6. The registrar shall administer to the witnesses who testify in said administrative hearing the same oath as is used in the trial of cases in the Circuit Court.

§ 7. The registrar shall require all testimony taken before him to be taken down by a competent stenographer or reporter, and a transcript thereof shall be filed with and retained by the registrar as a record of his office. All costs of such proceedings may be taxed by the registrar in accord with the manner and practice pertaining to costs in the Chancery Court under the laws of this state.

§ 8. If the decision of the registrar be that the applicant is qualified to register under the Constitution and laws of the State of Mississippi, he shall be forthwith registered; but if the registrar finds that applicant is not qualified under said Constitution and laws to be registered, he shall not register the applicant but shall mark his application "failed;" but if he finds that applicant is not of good moral character he shall so endorse the application and state the facts upon which the finding of lack of good moral character is based.

§ 9. At such hearing held by the registrar, applicant and any person or persons challenging the truthfulness or sufficiency of the application may be represented by counsel, but applicant and any challenger may appear pro se in and on his own behalf if they choose. Witnesses may be examined or cross-examined as in trials in the Circuit Court.

§ 10. An appeal may be taken to the Board of County Election Commissioners by any persons against whom the registrar may decide within the same time and in the same manner as is now provided for an appeal from registration or denial of registration by the registrar.

§ *11.* If the applicant or any challenger does not appear at the time and place set by the registrar for the hearing of any challenge, the registrar may, in his discretion, reset the hearing or may proceed and determine whether applicant is or is not, as the case may be, qualified under the Constitution and laws of the State of Mississippi to register to vote.

The person or persons against whom the registrar decides may appeal as above provided just as if a hearing had been held.

§ *12.* Strict rules of evidence shall not be enforced at the hearing herein provided for. Witnesses may be examined by the applicant or his attorneys, and by the challenger or challengers or their attorneys.

§ *13.* The provisions of this act are intended to provide an additional administrative method whereby third parties may challenge the sufficiency of any application to register and the good moral character of an applicant, and are not intended to affect the right, duty and authority of the registrar to determine such qualifications, as now provided by law, if no challenge is made by any third party.

* * * * *

APPENDIX B

MISSISSIPPI VOTER REGISTRATION APPLICATION FORM

SWORN WRITTEN APPLICATION FOR REGISTRATION

(By reason of the provisions of Sections 241, 241-A and 244 of the Constitution of Mississippi and relevant statutes of the State of Mississippi, the applicant for registration, if not physically disabled is required to fill in this form in his own handwriting in the presence of the registrar and without assistance or suggestion of any person or memorandum.)

1. Write the date of this application ----------
2. What is your full name? ----------
3. State your age and date of birth ----------
4. What is your occupation? ----------
5. Where is your business carried on? (Give city, town or village, and street address, if any, but if none, post office address.) If not engaged in business, so state. ----------
6. By whom are you employed? (Give name and street address, if any, but if none, post office address.) If not employed, so state. ----------
7. Where is your place of residence in the county and district where you propose to register? (Give city, town or village, and street address, if any, but if none, post office address.) ----------
8. Are you a citizen of the United States and an inhabitant of Mississippi? ----------
9. How long have you resided in Mississippi? ----
10. How long have you resided in the election district or precinct in which you propose to register? ----

11. State your last previous places of residence. (Give street address, if any, but if none, post office address.) _____

12. Are you a minister of the gospel in charge of an organized church, or the wife of such a minister? If so, what church? (Give address in each instance.) _____

13. Check which oath you desire to take: (1) General _____ (2) Minister's: _____ (3) Minister's wife: _____ (4) If under 21 years at present, but will be 21 years old by date of general election. _____

14. If there is more than one person of your same name in the precinct, by what name do you wish to be called? _____

15. Have you ever been convicted of any of the following crimes: bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy? _____

16. Have you ever been convicted of any other crime (excepting misdemeanors for traffic violations)? _____

17. If your answer to question 15 or 16 is "Yes", name the crime or crimes of which you have been convicted, and the year, court, and place of such conviction or convictions: _____

_____

_____

18. Write and copy in the space below, Section _____ of the Constitution of Mississippi: (Instructions to Registrar: You will designate the Section of the Constitution and point out same to applicant).

_____

_____

19. Write in the space below a reasonable interpretation (the meaning) of the Section of the Constitution of Mississippi which you have just copied:

---

20. Write in the space below a statement setting forth your understanding of the duties and obligations of citizenship under a constitutional form of government.

---

21. Sign the oath or affirmation referred to in question 13, and which is:

NOTE: Registrar give applicant oath selected under question 13, Mark out that portion of oath that is not applicable.

NOTE: Registrar. In registering voters in Cities and Towns not all in one election district, the name of such city or town may be substituted in the Oath for the Election District.

(a) GENERAL and/or SPECIAL OATH:

I, _____, do solemnly swear (or affirm) that I am twenty-one years old (or I will be before the next election in this County) and that I will have resided in this State two years, and _____ Election District of _____ County one year next preceding the ensuing election, and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the Constitution of this State as a disqualification to be an elector; that I will truly answer all questions propounded to me concern-

ing my antecedents so far as they relate to my right to vote, and also as to my residence before my citizenship in this District; that I will faithfully support the Constitution of the United States and of the State of Mississippi, and will bear true faith and allegiance to the same, So Help Me God.

Applicant's Signature to Oath

(b) OATH OF MINISTER and/or MINISTER'S WIFE:

I, _____, do solemnly swear (or affirm) that I am twenty-one years old (or I will be before the next election in this County) and that I am a Minister, or the wife of a Minister, of the Gospel in charge of an organized church, and that I will have resided two years in this State and in _____ Election District of _____ County six months next preceding the ensuing election, and am now in good faith a resident of the same, and that I am not disqualified from voting by reason of having been convicted of any crime named in the Constitution of this State as a disqualification to be an elector; that I will truly answer all questions propounded to me concerning my antecedents so far as they relate to my right to vote, and also as to my residence before my citizenship in this District; that I will faithfully support the Constitution of the United States and of the State of Mississippi, and will bear true faith and allegiance to the same. So Help Me God.

Applicant's Signature to Oath

Applicant's Signature to Application
(The Applicant will also sign his name here)

STATE OF MISSISSIPPI
County of _____

Sworn to and subscribed before me by the within named _____ on this the _____ day of _____, 19____.

_____
County Registrar

(SEAL)

Is applicant of good moral character? _____

If not, why? _____

Does applicant qualify? _____

Passed _____ Failed _____

_____
County Registrar

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